

3-6-2012

State v. Thomas Clerk's Record Dckt. 39374

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

KERRY STEPHEN THOMAS,

Defendant-Appellant.

Supreme Court Case No. 39374

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE MIKE WETHERELL

STATE APPELLATE PUBLIC DEFENDER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WASDEN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

State of Idaho vs. Kerry S Thomas

Date	Code	User		Judge
3/11/2009	NCRF	TCMCCOSL	New Case Filed - Felony	Thomas F. Neville
	PROS	TCMCCOSL	Prosecutor assigned Ada County Prosecutor	Thomas F. Neville
	WARI	TCMCCOSL	Warrant Issued - Arrest Bond amount: 500000.00 Defendant: Thomas, Kerry S	Thomas F. Neville
	XSEA	TCMCCOSL	Case Sealed	Thomas F. Neville
	STAT	TCMCCOSL	STATUS CHANGED: Inactive	Thomas F. Neville
	INDT	TCMCCOSL	Indictment	Thomas F. Neville
	INDT	TCWEGEKE	Indictment, Part II	Mike Wetherell
3/12/2009	MOTN	TCBULCEM	Motion for disqualification w/o cause	Thomas F. Neville
3/16/2009	CJWO	DCELLISJ	Change Assigned Judge: Disqualification W/O Cause	Mike Wetherell
	ORDR	DCELLISJ	Order To Disqualify	Mike Wetherell
		DCELLISJ	Notice of Reassignment	Mike Wetherell
	HRSC	DCELLISJ	Hearing Scheduled (Arraignment 03/19/2009 09:00 AM)	Mike Wetherell
		DCELLISJ	Order to Transport	Mike Wetherell
3/17/2009	RQDD	TCBULCEM	Defendant's Request for Discovery	Mike Wetherell
3/19/2009	DCHH	DCOATMAD	Hearing result for Arraignment held on 03/19/2009 09:00 AM: District Court Hearing Held Court Reporter: Nicole Omsberg Number of Transcript Pages for this hearing estimated: less than 50	Mike Wetherell
	HRSC	DCOATMAD	Hearing Scheduled (Entry of Plea 04/02/2009 09:00 AM)	Mike Wetherell
	NCON	DCOATMAD	No Contact Order: OR Civil Protection Order	Mike Wetherell
3/20/2009	MOTN	TCBULCEM	Motion for GJ transcript	Mike Wetherell
3/23/2009	WART	TCWADAMC	Warrant Returned Defendant: Thomas, Kerry S	Mike Wetherell
	XUNS	TCWADAMC	Case Un-sealed	Mike Wetherell
	STAT	TCWADAMC	STATUS CHANGED: Activate (previously inactive)	Mike Wetherell
3/24/2009	ORDR	DCOATMAD	Order for Grand Jury Transcript	Mike Wetherell
3/27/2009	PROS	PRROOTSM	Prosecutor assigned Jean Fisher	Mike Wetherell
3/31/2009	NOTC	TCKELLHL	Notice of Preparation of Grand Jury Transcript	Mike Wetherell
4/1/2009		DCOATMAD	Order to Transport 4/2/09	Mike Wetherell
4/2/2009	DCHH	DCOATMAD	Hearing result for Entry of Plea held on 04/02/2009 09:00 AM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: less than 50	Mike Wetherell
	HRSC	DCOATMAD	Hearing Scheduled (Jury Trial 07/10/2009 09:00 AM)	Mike Wetherell
	PLEA	DCOATMAD	A Plea is entered for charge: - NG (I39-608 Aids-transfer Body Fluid Containing Hiv Virus)	Mike Wetherell

State of Idaho vs. Kerry S Thomas

Date	Code	User		Judge
4/2/2009	PLEA	DCOATMAD	A Plea is entered for charge: - NG (I39-608 Aids-transfer Body Fluid Containing Hiv Virus)	Mike Wetherell
	PLEA	DCOATMAD	A Plea is entered for charge: - NG (I39-608 Aids-transfer Body Fluid Containing Hiv Virus)	Mike Wetherell
	PLEA	DCOATMAD	A Plea is entered for charge: - NG (I39-608 Aids-transfer Body Fluid Containing Hiv Virus)	Mike Wetherell
	PLEA	DCOATMAD	A Plea is entered for charge: - NG (I39-608 Aids-transfer Body Fluid Containing Hiv Virus)	Mike Wetherell
	PLEA	DCOATMAD	A Plea is entered for charge: - NG (I39-608 Aids-transfer Body Fluid Containing Hiv Virus)	Mike Wetherell
	PLEA	DCOATMAD	A Plea is entered for charge: - NG (I39-608 Aids-transfer Body Fluid Containing Hiv Virus)	Mike Wetherell
	PLEA	DCOATMAD	A Plea is entered for charge: - NG (I19-2514 Enhancement-persistent Violator)	Mike Wetherell
	HRSC	DCOATMAD	Hearing Scheduled (Pretrial Conference 06/25/2009 09:00 AM)	Mike Wetherell
		DCOATMAD	Notice of Trial Setting JT 7-10-09 PTC 6-25-09	Mike Wetherell
	CGRA	DCOATMAD	No Contact Order: Civil Order Granted: K.A.	Mike Wetherell
4/6/2009		DCOATMAD	Order to Transport 6/25/09 and 7/10/09	Mike Wetherell
4/16/2009	RQDS	TCRAMISA	State/City Request for Discovery	Mike Wetherell
	RSDS	TCRAMISA	State/City Response to Discovery	Mike Wetherell
4/17/2009	ORDR	DCOATMAD	Order Releasing Test Results to Victim	Mike Wetherell
4/20/2009	MOTN	TCURQUAM	Motion to Amend Information Part II	Mike Wetherell
	NOHG	TCURQUAM	Notice Of Hearing	Mike Wetherell
	HRSC	TCURQUAM	Hearing Scheduled (Hearing Scheduled 05/07/2009 09:00 AM)	Mike Wetherell
4/22/2009	ORDR	DCOATMAD	Order for Delivery of Medical Records	Mike Wetherell
4/24/2009		DCOATMAD	Order to Transport 5/7/09 at 9:00	Mike Wetherell
4/30/2009	MISC	TCRAMISA	State's Motion for Criminal Deposition of Out-of-State Witness	Mike Wetherell
	NOHG	TCRAMISA	Notice Of Hearing	Mike Wetherell
5/1/2009	MISC	TCRAMISA	Grand Jury Transcript Filed (file stamped 04/30/2009)	Mike Wetherell
5/5/2009	RSDS	TCRAMISA	State/City Response to Discovery/First Addendum	Mike Wetherell
5/7/2009	DCHH	DCOATMAD	Hearing result for Hearing Scheduled held on 05/07/2009 09:00 AM: District Court Hearing Held Court Reporter: Nicole Ormsberg Number of Transcript Pages for this hearing estimated: less than 50	Mike Wetherell
	INFO	DCOATMAD	Information Part II Filed	Mike Wetherell
5/8/2009	RQDD	TCKELLHL	Defendant's Request for Discovery/Specific	Mike Wetherell
5/14/2009	NOTC	TCRAMISA	Notice of Criminal Deposition Hearing	Mike Wetherell

State of Idaho vs. Kerry S Thomas

Date	Code	User	Judge
5/14/2009	HRSC	DCOATMAD	Hearing Scheduled (Hearing Scheduled 06/24/2009 09:00 AM)
5/15/2009		DCOATMAD	Order to Transport 6/24/09 at 9:00
5/19/2009	RSDS	TCBULCEM	State/City Response to Discovery/specific
	RSDS	TCBULCEM	State/City Response to Discovery/2nd addendum
5/20/2009	NOHG	TCKELLHL	Notice Of Hearing
	RSDS	TCKELLHL	State/City Response to Discovery/3rd Addendum
	MISC	TCKELLHL	State's Notice of Intent to Use Prior Charged Misconduct Under IRE 404(b); and State's Notice of Intent to Use Defendant's Prior Conviction(s) Under IRE 609
5/21/2009	HRSC	TCKELLHL	Hearing Scheduled (Hearing Scheduled 06/10/2009 01:30 PM)
5/22/2009		DCOATMAD	Order to Transport 6/10/09
6/9/2009	CONT	DCOATMAD	Continued (Hearing Scheduled 06/10/2009 09:30 AM)
6/10/2009	DCHH	DCOATMAD	Hearing result for Hearing Scheduled held on 06/10/2009 09:30 AM: District Court Hearing Held Court Reporter: Nicole Omsberg Number of Transcript Pages for this hearing estimated: less than 50
6/22/2009		DCOATMAD	Order to Transport 6/24/09 at 9:00
6/24/2009	DCHH	DCOATMAD	Hearing result for Hearing Scheduled held on 06/24/2009 09:00 AM: District Court Hearing Held Court Reporter: Nicole Omsberg Number of Transcript Pages for this hearing estimated: less than 50
	HRVC	DCOATMAD	Hearing result for Pretrial Conference held on 06/25/2009 09:00 AM: Hearing Vacated
	HRSC	DCOATMAD	Hearing Scheduled (Sentencing 09/11/2009 01:00 PM)
	PLEA	DCOATMAD	A Plea is entered for charge: - GT (I39-608 Aids-transfer Body Fluid Containing Hiv Virus)
	PLEA	DCOATMAD	A Plea is entered for charge: - GT (I39-608 Aids-transfer Body Fluid Containing Hiv Virus)
	HRVC	DCOATMAD	Hearing result for Jury Trial held on 07/10/2009 09:00 AM: Hearing Vacated
		DCOATMAD	Order to Transport 9/11/09 at 1:00
	PSIO1	TCMCKEAE	Pre-Sentence Investigation Evaluation Ordered
7/1/2009	MOTN	TCBULCEM	Motion to release defendant's prior psychosexual evaluations
7/7/2009	ORDR	DCOATMAD	Order for Psychosexual Evaluation
	ORDR	DCOATMAD	Order to Release Defendant's Prior Psychosexual Evaluations
	ORDR	DCOATMAD	Ex Parte Order Granting Access to Defendant

State of Idaho vs. Kerry S Thomas

Date	Code	User		Judge
7/8/2009	CONT	DCOATMAD	Continued (Sentencing 09/18/2009 01:30 PM)	Mike Wetherell
		DCOATMAD	Amended Order to Transport 9/18/09	Mike Wetherell
7/10/2009	NOTC	TCBULCEM	Notice resetting hearing	Mike Wetherell
	CONT	TCBULCEM	Continued (Sentencing 09/16/2009 01:30 PM)	Mike Wetherell
9/10/2009	ORDR	DCDANSEL	Order Re: Presentence Investigation Report	Mike Wetherell
9/14/2009		DCDANSEL	Order to Transport (9-16-09)	Mike Wetherell
9/16/2009	ORDR	DCDANSEL	Order Granting Request to Broadcast Proceedings	Mike Wetherell
	DCHH	DCOATMAD	Hearing result for Sentencing held on 09/16/2009 01:30 PM: District Court Hearing Held Court Reporter: Jeanne Hirmer Number of Transcript Pages for this hearing estimated: loess than 50	Mike Wetherell
	FIGT	DCOATMAD	Finding of Guilty (I39-608 Aids-transfer Body Fluid Containing Hiv Virus)	Mike Wetherell
	JAIL	DCOATMAD	Sentenced to Jail or Detention (I39-608 Aids-transfer Body Fluid Containing Hiv Virus) Confinement terms: Credited time: 190 days. Penitentiary determinate: 10 years. Penitentiary indeterminate: 5 years.	Mike Wetherell
	FIGT	DCOATMAD	Finding of Guilty (I39-608 Aids-transfer Body Fluid Containing Hiv Virus)	Mike Wetherell
	JAIL	DCOATMAD	Sentenced to Jail or Detention (I39-608 Aids-transfer Body Fluid Containing Hiv Virus) Confinement terms: Credited time: 170 days. Penitentiary determinate: 10 years. Penitentiary indeterminate: 5 years.	Mike Wetherell
	STAT	DCOATMAD	STATUS CHANGED: closed pending clerk action	Mike Wetherell
	SNPF	DCOATMAD	Sentenced To Pay Fine 0.00 charge: I39-608 Aids-transfer Body Fluid Containing Hiv Virus	Mike Wetherell
	SNPF	DCOATMAD	Sentenced To Pay Fine 0.00 charge: I39-608 Aids-transfer Body Fluid Containing Hiv Virus	Mike Wetherell
	RESR	DCOATMAD	Restitution Recommended by the Prosecutor's office. 1102.10 victim # 1	Mike Wetherell
	RESR	DCOATMAD	Restitution Recommended by the Prosecutor's office. 551.25 victim # 2	Mike Wetherell
9/17/2009	JCOC	DCDANSEL	Judgment Of Conviction & Order Of Commitment	Mike Wetherell
	ORDR	DCDANSEL	Order for DNA Sample	Mike Wetherell
	ORDR	DCDANSEL	Order for Restitution and Judgment	Mike Wetherell
	APSC	TCBULCEM	Appealed To The Supreme Court	Mike Wetherell
9/25/2009	ORDR	DCOATMAD	Order Appointing State Appellate PD on Direct Appeal	Mike Wetherell
9/28/2009	MOTN	TCRAMISA	Motion for Reconsideration of Sentence	Mike Wetherell
	BREF	CCTHIEBJ	Brief In Support Of Def Motion For Reconsideration Of Sentence	Mike Wetherell

State of Idaho vs. Kerry S Thomas

Date	Code	User		Judge
10/6/2009	MOTN	TCRAMISA	Motion to Withdraw Guilty Plea	Mike Wetherell
10/9/2009	ORDR	DCOATMAD	Order Denying Motion to Reduce Sentence	Mike Wetherell
	ORDR	DCOATMAD	Order Denying Hearing Re: Motion to Withdraw Guilty Plea	Mike Wetherell
10/16/2009	NOTA	CCTHIEBJ	Amended Notice of Appeal	Mike Wetherell
12/14/2009	NOTC	CCTHIEBJ	(3) Notice Of Transcript Lodged - Supreme Court Docket No. 36947	Mike Wetherell
2/4/2010	STAT	CCTOMPMA	STATUS CHANGED (batch process)	
4/7/2010	MOTN	TCPETEJS	Defendant's Renewed Motion to Withdraw Guilty Plea	Mike Wetherell
	MISC	TCPETEJS	Memorandum in Support of Defendant's Renewed Motion to Withdraw Guilty Plea	Mike Wetherell
4/22/2010	ORDR	DCOATMAD	Memorandum and Order Denying Motion to Withdraw Guilty Plea	Mike Wetherell
4/27/2010	APSC	TCPETEJS	Appealed To The Supreme Court	Mike Wetherell
	ORDR	DCOATMAD	Order Appointing State Appellate Public Defender on Appeal	Mike Wetherell
3/16/2011	MISC	CCSIMMSM	Opinion - Supreme Court Docket No. 36947	Mike Wetherell
4/15/2011	REMT	CCSIMMSM	Remittitur - Vacated and Remanded - Supreme Court Docket No. 36947	Mike Wetherell
4/18/2011	HRSC	DCOATMAD	Hearing Scheduled (Review Hearing 05/12/2011 09:00 AM)	Mike Wetherell
	STAT	DCOATMAD	STATUS CHANGED: Closed pending clerk action	Mike Wetherell
		DCOATMAD	Order to Transport 5/12/11 at 9:00	Mike Wetherell
		DCOATMAD	Notice of Hearing	Mike Wetherell
5/6/2011	CONT	DCOATMAD	Continued (Review Hearing 05/20/2011 01:30 PM)	Mike Wetherell
		DCOATMAD	Order to Transport 5/20/11 at 1:30	Mike Wetherell
5/9/2011	MOTT	TCFARANM	Motion To Transport Defendant For Review Hearing	Mike Wetherell
	NOHG	TCFARANM	Notice Of Hearing	Mike Wetherell
5/19/2011	MOTN	TCRUBIKA	Motion for Production of Transcripts of Various Hearings	Mike Wetherell
5/20/2011	DCHH	DCOATMAD	Hearing result for Review Hearing held on 05/20/2011 01:30 PM: District Court Hearing Held Court Reporter: Nicole Ormsberg Number of Transcript Pages for this hearing estimated: less than 10 pgs	Mike Wetherell
	HRSC	DCOATMAD	Hearing Scheduled (Review Hearing 07/22/2011 10:00 AM)	Mike Wetherell
		DCOATMAD	Order to Transport 7/22/11 at 10:00	Mike Wetherell
5/24/2011	ORDR	DCOATMAD	Order for Production of Transcripts of Various Hearings	Mike Wetherell

State of Idaho vs. Kerry S Thomas

Date	Code	User	Judge
7/14/2011	MISC	TCBROXLV	Amended Notice of Status Conference
	HRSC	TCBROXLV	Hearing Scheduled (Review Hearing 08/05/2011 11:00 AM)
7/15/2011	CONT	DCOATMAD	Hearing result for Review Hearing scheduled on 07/22/2011 10:00 AM: Continued
8/3/2011		DCOATMAD	Order to Transport 8/5/11
8/5/2011	DCHH	DCOATMAD	Hearing result for Review Hearing scheduled on 08/05/2011 11:00 AM: District Court Hearing Held Court Reporter: Nicole Ombserg Number of Transcript Pages for this hearing estimated: less than 50 pgs
	HRSC	DCOATMAD	Hearing Scheduled (Hearing Scheduled 11/02/2011 10:00 AM)
	HRSC	DCOATMAD	Hearing Scheduled (Hearing Scheduled 08/24/2011 03:00 PM)
		DCOATMAD	Order to Transport 8/24/11 at 3:00
8/12/2011	MOTN	TCTONGES	State's Motion to Waive Attorney-Client Privilege
8/22/2011	NOTC	TCOLSOMC	Notice of Intent to Assert Attorney-Client Privilege and Objection to State's Motion to Waive Attorney-Client Privilege
8/25/2011	DCHH	DCOATMAD	Hearing result for Hearing Scheduled scheduled on 08/24/2011 03:00 PM: District Court Hearing Held Court Reporter: Penny Tardiff Number of Transcript Pages for this hearing estimated: less than 50 pgs
8/29/2011	MISC	TCOLSOMC	Defendant's Memorandum
9/16/2011	MOTN	TCTONGES	State's Motion to Correct Sentencing Pursuant to I.C.R. 35
	BREF	TCTONGES	State's Brief Objecting to Defendant's Motino to Withdraw Guilty Plea
10/3/2011	MEMO	TCTONGES	Defendant's Supplemental Memorandum in Support of Motion to Withdraw Guilty Plea
10/5/2011	MISC	TCOLSOMC	State's Reply Brief to Defendant's Supplemental Memorandum in Support of Motion to Withdraw Guilty Plea
10/28/2011		DCOATMAD	Order to Transport 11/2/11 at 10:00
11/2/2011	DCHH	DCOATMAD	Hearing result for Hearing Scheduled scheduled on 11/02/2011 10:00 AM: District Court Hearing Held Court Reporter: Vanessa Gosney Number of Transcript Pages for this hearing estimated: less than 50 pgs
11/3/2011	JCOC	DCDANSEL	AMENDED Judgment Of Conviction & Order Of Commitment
11/14/2011	APSC	CCTHIEBJ	Appealed To The Supreme Court

State of Idaho vs. Kerry S Thomas

Date	Code	User		Judge
11/14/2011	MOTN	TCOLSOMC	Motion for Proder Appointing State Appellate Public Defender on Appeal	Mike Wetherell
11/15/2011	ORDR	DCOATMAD	Order Appointing State Appellate Public Defender on Appeal	Mike Wetherell
2/3/2012	NOTC	CCTHIEBJ	Notice Of Transcript Lodged - Supreme Court Docket No. 39374	Mike Wetherell

APR 07 2010

J. DAVID NAVARRO, Clerk
By SCARLETT RAMIREZ
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

KERRY STEPHEN THOMAS,

Defendant.

Case No. CR-FE-2009-0004448

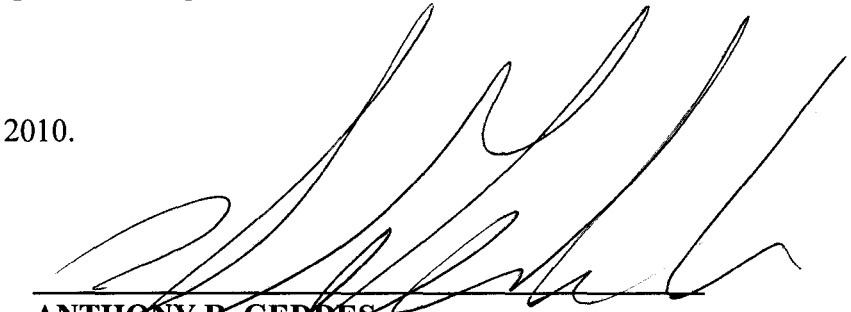
DEFENDANT'S RENEWED MOTION
TO WITHDRAW GUILTY PLEA

COMES NOW, KERRY STEPHEN THOMAS, Defendant above-named, by and through counsel ANTHONY R. GEDDES, Ada County Public Defender's office, and moves this Court pursuant to Idaho Criminal Rule 33(c) to allow Defendant to withdraw his plea of guilty in the above-entitled matter, as said guilty plea was not voluntarily, knowingly, and intelligently made.

Prior to entering his plea of guilty, Kerry Stephen Thomas was not advised by the Court that he could receive a consecutive sentence. Attached hereto and incorporated by reference

herein is the Reporter's Transcript on Appeal. In support, Defendant offers a memorandum, which is now on file with the Court.

DATED, this 5 day of April 2010.



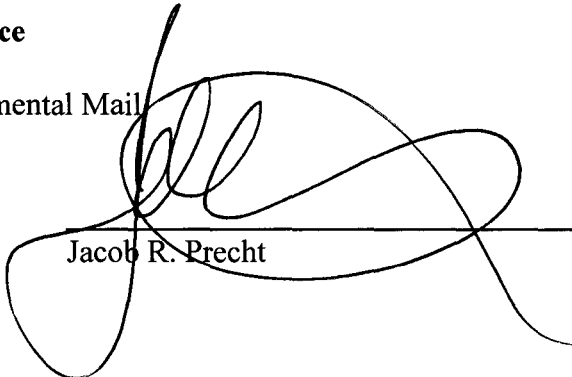
ANTHONY R. GEDDES
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 7 day of April 2010, I mailed a true and correct copy of the within instrument to:

JEAN M. FISHER
Ada County Prosecutor's Office

by placing said same in the Interdepartmental Mail



Jacob R. Precht

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,
Plaintiff-Respondent,
vs.
KERRY STEPHEN THOMAS,
Defendant-Appellant.

Docket No. 369009

SCANNED

REPORTER'S TRANSCRIPT ON APPEAL

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, the Honorable Michael E. Wetherell, District Judge.

LAWRENCE G. WASDEN, IDAHO ATTORNEY GENERAL
Post Office Box 83720
Boise, Idaho 83720-0010
Attorney for Plaintiff-Respondent

STATE APPELLATE PUBLIC DEFENDER
3647 Lake Harbor Lane
Boise, Idaho 83703
Attorney for Defendant-Appellant

COPY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

KERRY STEPHEN THOMAS,

Defendant.

Case No. CRFE-2009-004448

Entry of Plea Hearing
6/24/09

BEFORE

THE HONORABLE MICHAEL E. WETHERELL,

DISTRICT JUDGE

BE IT REMEMBERED that the above-entitled matter
came on regularly for hearing before the court in the Ada
County Courthouse, in Boise, Idaho, on June 24, 2009.

A P P E A R A N C E S

For the State:

GREG H. BOWER, ADA COUNTY
PROSECUTING ATTORNEY
By: Jean Fisher
Prosecuting Attorney
200 West Front Street, Suite 366
Boise, Idaho 83702

For the Defendant:

ADA COUNTY PUBLIC DEFENDER
By: Anthony Geddes
200 West Front Street, Suite 1107
Boise, Idaho 83702

I N D E X

<u>Date</u>	<u>Proceeding</u>	<u>Page</u>
6-24-09	Entry of plea hearing	1

1 **BOISE, IDAHO**
 2 **Wednesday, June 24, 2009, 9:57 a.m.**
 3
 4 THE COURT: The Court will take up the
 5 matter of State versus Kerry Thomas, Case
 6 No. CRFE-2009-0004448. The Court notes that the
 7 defendant is present in the courtroom with
 8 counsel, Mr. Geddes. Ms. Fisher is representing
 9 the State and is present in the courtroom.
 10 Counsel, what is the status of the
 11 case?
 12 MR. GEDDES: Thank you, Judge. I would
 13 like to express my appreciation for the
 14 accommodation you have given us this morning.
 15 Obviously, this decision carries a great deal of
 16 import for my client.
 17 I have spent some time with him at
 18 the prison. I've spent some time with him on the
 19 phone and here in court talking about it. But we
 20 needed some more time, and I appreciate your
 21 willingness to give us that.
 22 The status of the case, Judge, is
 23 that my client is going to enter a guilty plea to
 24 two counts of attempt to transmit the HIV virus.
 25 In exchange, the State is agreeing to dismiss the

1 MR. GEDDES: Yeah. To block off the
 2 afternoon, I think, would be sufficient. And then
 3 there would be some latitude to go a little longer
 4 if we had to, Judge. So that would be fine.
 5 THE COURT: Ms. Fisher?
 6 MS. FISHER: That's fine with the State.
 7 As far as the plea negotiations in this case, the
 8 State expressly reserves the right to argue the
 9 facts and circumstances of all of the dismissed
 10 charges.
 11 MR. GEDDES: That is, of course, their
 12 right.
 13 THE COURT: September 11th at 1:30 -- or I
 14 guess we could make it 1:00. September 11th at
 15 1:00.
 16 MR. GEDDES: That's fine, Judge.
 17 MS. FISHER: Thank you.
 18 As to the evaluation, Your Honor,
 19 the State and counsel have agreed that that will
 20 be a SANE evaluation or maybe perhaps just with
 21 Dr. Johnston.
 22 MR. GEDDES: Dr. Johnston is fine, Judge.
 23 THE COURT: The clerk reminds me -- and it
 24 is always good to have the clerk remind me -- we
 25 might have an issue with regard to transport,

1 remaining five counts and the sex offender
 2 enhancement.
 3 There is no agreement as to
 4 sentencing. We will go forward with open
 5 sentencing. My client will waive his Estrada
 6 rights and agree to participate in the
 7 pre-sentence investigation process and obtain a
 8 psychological evaluation, psychosexual evaluation.
 9 I will tell the Court for the record
 10 that I would request a setting probably -- this
 11 sentencing is going to take a lot of time, Judge.
 12 So we are obviously going to put a lot of effort
 13 into this and have numerous witnesses.
 14 So I would ask for a setting
 15 sometime in the first or second week of September,
 16 with enough time on your calendar to set aside a
 17 block of time for sentencing.
 18 Thank you, Judge.
 19 THE COURT: Is three hours sufficient
 20 time, do you believe?
 21 MR. GEDDES: Maybe. Quite frankly, I
 22 would request the opportunity for more in case it
 23 is needed; it may very well be.
 24 THE COURT: With an afternoon, that would
 25 give the defense four hours.

1 because 1 o'clock wouldn't be the usual hour, but
 2 we will certainly give it our best shot.
 3 MR. GEDDES: Thank you, Judge.
 4 THE COURT: Both counsel should be aware
 5 of the fact that sometimes glitches do occur with
 6 regard to transport when you set something up a
 7 little earlier than they anticipate.
 8 Now, with regard to the Information
 9 Part II would be dismissed, which of the alleged
 10 underlying acts --
 11 MR. GEDDES: II and VII.
 12 THE COURT: -- is the defendant going to
 13 be pleading to? The VII?
 14 MR. GEDDES: II and VII.
 15 THE COURT: Counsel, do you believe that
 16 you have had adequate time to fully discuss this
 17 case and all of its ramifications with your
 18 client?
 19 MR. GEDDES: Yes, Your Honor, I believe
 20 so.
 21 THE COURT: Have you discussed fully with
 22 him his rights, defenses, and the possible
 23 consequences to him of the guilty plea?
 24 MR. GEDDES: Yes, I have.
 25 THE COURT: Have you been able to do all

1 you feel should be done by way of discovery in
 2 this case?
 3 MR. GEDDES: Yes, Your Honor.
 4 THE COURT: Do you then consent to the
 5 entry of the pleas of guilty to Count II and
 6 Count VII of the Indictment, which are charges of
 7 transfer of bodily fluid which may contain the HIV
 8 virus, each of which can receive a sentence of up
 9 to 15 years in prison and a fine of up to \$5,000,
 10 or both?
 11 MR. GEDDES: I believe it is the correct
 12 course of action, Judge.
 13 THE COURT: Mr. Thomas, your attorney has
 14 just made various representations to the Court
 15 regarding your conversations concerning your
 16 guilty pleas in this matter. Do you agree with
 17 those representations?
 18 THE DEFENDANT: Yes.
 19 THE COURT: Do you understand no one is
 20 ever required to plead guilty; you always have the
 21 right to go to trial and require the State to
 22 prove its case?
 23 THE DEFENDANT: I understand that.
 24 THE COURT: Then I am going to be
 25 questioning you at this time. The purpose is not

5

1 EXAMINATION
 2 BY THE COURT:
 3 Q. Mr. Thomas, it is my understanding
 4 that you are going to be pleading guilty this
 5 morning to two counts of intentionally
 6 transferring the HIV virus and that you understand
 7 that each of those could expose you to a sentence
 8 of up to 15 years in prison and a fine up to
 9 \$5,000, or both; and that because sentences can be
 10 imposed consecutively in Idaho, you are at risk
 11 for imprisonment for up to 30 years, fines of up
 12 to \$10,000, or both, and restitution should that
 13 be appropriate to any victim in this case. Is
 14 that correct?
 15 A. That is correct.
 16 Q. If at anytime during this process
 17 you do not understand any questions that I ask or
 18 any words that I use, don't hesitate to stop me
 19 and tell me. I will be happy to rephrase or to
 20 explain.
 21 Do you understand that you have that
 22 right?
 23 A. I do.
 24 Q. Do you understand that if, for any
 25 reason, you are reluctant to do that, you simply

7

1 to embarrass you; it is to make sure you
 2 understand the nature of the offense and the
 3 potential consequences of the guilty plea.
 4 I want to make sure your plea is
 5 voluntarily, and I want to make sure you actually
 6 committed the crime to which you are pleading
 7 guilty. I do not want you to plead guilty to a
 8 crime you did not commit.
 9 If you plead guilty and your plea is
 10 not accepted, then anything you say in the course
 11 of the questioning to take the plea could, and
 12 likely would, be used against you in a jury trial.
 13 Do you understand that?
 14 THE DEFENDANT: I do.
 15 THE COURT: Then the Court will note that
 16 we are taking this plea at 10 o'clock in the
 17 morning. It was originally set for 9 o'clock in
 18 the morning, and the court granted additional time
 19 to the parties so that the matter could be more
 20 fully discussed by defense counsel with his
 21 client.
 22 (Defendant sworn.)
 23
 24
 25

6

1 have to ask Mr. Geddes? I can assure you, he has
 2 been doing this quite a while; he will have no
 3 problem asking a question for you. Do you
 4 understand that you can do it that way, too?
 5 A. I do.
 6 Q. Can you give me your full name for
 7 the record?
 8 A. It is Kerry Stephen Thomas.
 9 Q. And you are over the age of 18; is
 10 that correct?
 11 A. That is correct.
 12 Q. You reside currently in the state of
 13 Idaho?
 14 A. That is correct.
 15 Q. Are you currently married?
 16 A. I am currently married.
 17 Q. How far did you go in school?
 18 A. Fifteen years of college.
 19 Q. Do you understand the nature of the
 20 charge against you and the possible penalties
 21 which can be imposed as a result of your guilty
 22 plea?
 23 A. I understand.
 24 Q. Do you understand that there are
 25 other consequences to you of a plea of guilty to

8

1 felony charges?
 2 A. I do understand there are other
 3 consequences, yes.
 4 Q. Do you understand that if you are
 5 not a citizen of the United States, your plea of
 6 guilty to a felony or even a misdemeanor can
 7 result in deportation, the inability to obtain
 8 legal status, or denial of an application for
 9 United States citizenship?
 10 A. I do understand.
 11 Q. Do you understand that if you are a
 12 United States citizen, you will lose your right to
 13 possess firearms, serve on a jury, hold public
 14 office, and vote?
 15 A. I do.
 16 Q. Do you understand that, under Idaho
 17 law, if you successfully serve your sentence, your
 18 rights to vote, hold public office, and serve on a
 19 jury are automatically restored to you, but your
 20 right to possess firearms would not be?
 21 A. I understand that.
 22 Q. Do you understand that felonies on
 23 your record can lead to persistent violator
 24 charges and increased penalties in the future
 25 should you plead guilty or be found guilty of

9

1 the sentencing recommendations which have been
 2 discussed in open court in your presence today?
 3 A. No.
 4 Q. Do you understand that I'm not bound
 5 by any promise or recommendation from either party
 6 as to punishment, and that I may accept, reject,
 7 or modify any sentencing recommendations?
 8 A. I understand that.
 9 Q. Are you pleading guilty just to get
 10 it over with, even though you believe you are
 11 innocent?
 12 A. No.
 13 Q. Do you understand that before I will
 14 dispose of your case, I will order a pre-sentence
 15 investigation be prepared, and I will study that
 16 report before sentencing?
 17 A. I understand that.
 18 Q. Do you also understand that in this
 19 case, I would order a psychological and
 20 psychosexual evaluation be performed, and I would
 21 study that before sentencing, as well?
 22 A. I understand that.
 23 Q. Do you understand that your
 24 pre-sentence investigation would reveal any prior
 25 criminal record, and I would take that into

11

1 committing another felony?
 2 A. I understand that.
 3 Q. Do you understand that you can be
 4 held responsible for court costs and other
 5 statutory assessments, including public defender
 6 reimbursement and restitution to any victim or
 7 victims, if that is appropriate?
 8 A. I understand.
 9 THE COURT: Counsel, does this agreement
 10 involve any waiver of the defendant's right to
 11 appeal?
 12 MR. GEDDES: It does not, Your Honor.
 13 Q. (BY THE COURT) Has anyone promised
 14 you that I would be easy on you if you pled guilty
 15 to the offense?
 16 A. No.
 17 Q. Do you understand that the only
 18 person who can promise you what sentence you will
 19 actually receive is the judge?
 20 A. I understand.
 21 Q. Has anyone threatened you or anyone
 22 close to you to get you to plead guilty?
 23 A. No.
 24 Q. Has anyone offered you any rewards
 25 of any kind to make you plead guilty other than

10

1 consideration in sentencing?
 2 A. I do understand that.
 3 Q. Do you understand if you receive a
 4 sentence -- let's take, as an example, a sentence
 5 of five years with two years fixed and three years
 6 indeterminate, that there is no requirement that
 7 you be released in two years; the authorities can
 8 keep you the entire five-year period?
 9 A. I do understand that.
 10 Q. Have you made any confessions or
 11 admissions to the police in this case?
 12 A. Not that I'm aware of.
 13 Q. Are you presently on probation or
 14 parole?
 15 A. As of last Friday, I am no longer.
 16 My parole is revoked.
 17 Q. All right. Are you presently
 18 addicted to the use of alcohol or drugs?
 19 A. I am not.
 20 Q. Are you under the influence of any
 21 alcohol or drugs here at this time?
 22 A. I am not.
 23 Q. Do you take any medication for any
 24 physical or mental health problem?
 25 A. I do not.

12

1 Q. You do have the HIV virus. Are you
 2 taking medications for that?
 3 A. I currently am.
 4 Q. All right. Does anything about that
 5 underlying condition or the medications which you
 6 take for it affect your ability to understand the
 7 proceedings here today?
 8 A. Not that I'm aware of.
 9 Q. Do you have any psychological or
 10 mental problems that might have a bearing on your
 11 case?
 12 A. Not that I'm aware of.
 13 Q. Are you currently seeing or
 14 consulting a doctor or a healthcare professional
 15 for any other health problems?
 16 A. No.
 17 Q. Can you tell me when you decided to
 18 plead guilty in this matter?
 19 A. It was a process. I think
 20 primarily, though, my final decision was last
 21 night. So that would have been the --
 22 Q. And why did you decide to plead
 23 guilty to these two charges?
 24 A. Specifically for the two charges, I
 25 think that's what I believe that I'm guilty of.

13

1 Q. Sometimes I have individuals tell me
 2 that their attorney has somehow forced them to
 3 plead guilty to a charge. Do you believe that
 4 your attorney has in any way forced you to plead
 5 guilty to these offenses?
 6 A. I do not believe that to be true.
 7 Q. Do you fully understand that, by
 8 pleading guilty, you are giving up your
 9 constitutional rights to a trial by jury; you are
 10 giving up your presumption of innocence; you're
 11 giving up your right to require the State to prove
 12 your guilt as to each element of each charge,
 13 including factual findings as to the imposition of
 14 sentence, beyond a reasonable doubt; you're giving
 15 up the right to confront your accusers and
 16 cross-examine them; and you are giving up your
 17 privilege against self-incrimination, which
 18 includes a waiver of any right you may have to
 19 refuse to participate in a pre-sentence
 20 investigation, an alcohol or substance abuse
 21 evaluation, a psychological, psychiatric or
 22 psychosocial or psychosexual evaluation, to assist
 23 the court in sentencing or to refuse to take part
 24 in treatment if indicated necessary by any
 25 evaluation?

15

1 Q. Are you pleading guilty freely and
 2 voluntarily?
 3 A. I am.
 4 Q. Do you believe that this plea of
 5 guilty is in your best interest?
 6 A. In my best interest?
 7 Q. Yes.
 8 A. I do.
 9 Q. And did you fully discuss the matter
 10 of pleading guilty with your attorney?
 11 A. I did.
 12 Q. Do you feel that you have had enough
 13 time to discuss these matters with your attorney?
 14 A. I do.
 15 Q. Have you explained to your attorney
 16 everything you know about the charges?
 17 A. I have.
 18 Q. Has your attorney advised you to
 19 your satisfaction of your rights, defenses, and
 20 the possible consequences to you of these two
 21 guilty pleas?
 22 A. He has.
 23 Q. Are you satisfied with your
 24 attorney's representation of you in these matters?
 25 A. I am.

14

1 A. I do understand.
 2 Q. Do you understand that, in this case
 3 and as to these particular charges, that as to
 4 Count II to which you are pleading guilty, as
 5 contained in the Indictment, that if this matter
 6 were to go to trial, that the State would have to
 7 prove to a jury of twelve members -- and that that
 8 jury would have to find unanimously, all of them,
 9 beyond a reasonable doubt -- that you, during
 10 November of 2008, in the county of Ada, in the
 11 state of Idaho, knowing that you been infected
 12 with the HIV virus, exposed another person,
 13 initials K.A., to the human immunodeficiency
 14 virus, HIV, by transferring or attempting to
 15 transfer any of your bodily fluid, to wit, semen
 16 and/or saliva, by genital-to-genital and/or
 17 oral-to-genital contact without disclosing your
 18 infection of the HIV virus to K.A.?
 19 Do you understand that they would
 20 have to prove all of that beyond a reasonable
 21 doubt?
 22 A. I do understand that.
 23 Q. And with regard to Count VII, that
 24 they would have to prove in the same way, beyond a
 25 reasonable doubt, and that the jury of twelve

16

1 members would have to find unanimously, all of
 2 them, beyond a reasonable doubt that you, on or
 3 about the 23rd day of December 2008, in the county
 4 of Ada, in the state of Idaho, knowing that you
 5 had been infected with the HIV virus, exposed
 6 another person, K.A., to the virus by transferring
 7 or attempting to transfer any of your bodily
 8 fluid, to wit, semen and/or saliva, by
 9 genital-to-genital and/or oral-to-genital contact
 10 without disclosing your infection of the HIV virus
 11 to K.A.?

12 Do you understand that they would
 13 have to prove all of that beyond a reasonable
 14 doubt?

15 A. I do.

16 Q. Do you fully understand that, by
 17 pleading guilty to these two counts, that you are
 18 giving up any possible defenses, including
 19 technical defenses that you may have to each of
 20 the counts, and the State no longer has to prove
 21 each of the elements of the charges of each count
 22 beyond a reasonable doubt because you are
 23 admitting to all of them?

24 A. I do.

25 Q. Do you understand that when you

17

1 was no intent on his part to make her ill or to
 2 transmit the virus; that was not his intention.

3 But he is, in fact, guilty of
 4 knowing he had HIV, having sex with her,
 5 consensual sex with her, without advising her of
 6 his HIV status. So he just wants to clarify that
 7 issue.

8 THE COURT: Thank you, Counsel.
 9 Ms. Fisher, anything that you would
 10 like to say with regard to the record on that
 11 matter?

12 MS. FISHER: No.

13 THE COURT: I don't know what the case law
 14 states, Mr. Thomas. I will advise you that I
 15 haven't been asked to research this matter.

16 I will advise you that there is a
 17 standard jury instruction that the Court must give
 18 that there must be a union or joint operation of
 19 act and intent in every criminal case.

20 I will also advise you that,
 21 further, there is an instruction -- since this
 22 would be a general intent crime -- that would be
 23 given to the jury that says that intent is not the
 24 intent to violate the law but is merely to perform
 25 the act committed.

19

1 plead guilty to a charge, you are admitting that
 2 the charge is true; and when you enter a plea of
 3 not guilty, you are denying the charge?

4 A. I do.

5 Q. Are there any questions that you
 6 would like to ask your attorney at this time
 7 before we proceed further?

8 A. I do have a quick question.

9 Q. Go ahead.
 10 (Defendant conferring with counsel.)
 11 MR. GEDDES: Judge, I would like to
 12 clarify.

13 We have talked about this at great
 14 length. The statute does not require, from my
 15 reading, the showing of intent. The statute --
 16 there is part of it that someone can be found
 17 guilty if they are proven to have intentionally
 18 tried to transfer the HIV virus.

19 But there's another section followed
 20 by the "or" where they simply have to be -- they
 21 have to know that they are HIV positive, and then
 22 they expose their fluids to another person, which
 23 makes them guilty.

24 My client will advise you -- and we
 25 have talked about this at great length -- there

18

1 So I want you to be aware of the
 2 fact that that would be, in all probability, the
 3 instructions that would be given to the jury.

4 Knowing that, do you still wish to
 5 go forward with your guilty plea today?

6 MR. GEDDES: Can I have a moment?
 7 (Defendant conferring with counsel.)
 8 MR. GEDDES: Thank you, Judge. We're
 9 ready.

10 Q. (BY THE COURT) All right.
 11 Mr. Thomas, then I will ask you the same question:
 12 Are you still prepared, after having been advised
 13 of that, of the -- that you wish to move forward
 14 with your guilty plea today?

15 A. I do.

16 Q. Do you understand that if the Court
 17 were to for any reason be found -- or if you were
 18 to be found guilty at a trial and if the Court had
 19 any of that wrong, that you would have the right
 20 to appeal that?

21 A. I do understand.

22 Q. And do you understand that, in terms
 23 of entering your guilty plea today, you're
 24 admitting that all of these facts are true for
 25 purposes of entering the guilty plea?

20

1 A. As Mr. Geddes explained to me, that
 2 I do understand. And that's all right.
 3 Q. Then, after all of the questions I
 4 have asked, do you still want to plead guilty
 5 today?
 6 A. I do.
 7 Q. Can you then tell me in your own
 8 words, with regard to Count II, what you did to be
 9 guilty of knowing or of transferring the HIV virus
 10 or attempting to transfer the HIV virus in
 11 November of 2008?
 12 A. I will do the best I can. It was
 13 the first part of November. I think it was either
 14 the first or second week of November. I think in
 15 the Indictment, it reads K.A., but I knew her as
 16 Diana.
 17 We had been dating for or seeing
 18 each other for a short amount of time. She came
 19 over to my residence, and we engaged in sexual
 20 contact. And I didn't clearly state to her or
 21 make it really crystal clear that I was HIV
 22 positive prior to us having sexual contact.
 23 Q. And then with regard to Count VII,
 24 can you tell me what you did to be guilty of
 25 Count VII with regard to the date of December 23rd

21

1 THE COURT: All right.
 2 Q. (BY THE COURT) Then, Mr. Thomas, I
 3 will ask you again: With regard to Count II, did
 4 you fail to inform her that you had the HIV virus?
 5 A. When -- on Count II, which was in
 6 December, it was not discussed at all. So I did
 7 not tell her I was HIV positive.
 8 Q. Well, that was -- Count VII was
 9 December.
 10 A. Oh. Excuse me.
 11 Q. With regard to Count II, then,
 12 November, did you at any time tell her that you
 13 had the HIV virus?
 14 (Defendant conferring with counsel.)
 15 THE DEFENDANT: I did not.
 16 THE COURT: From the standpoint of the
 17 State, are those answers now sufficiently clear?
 18 MS. FISHER: Yes, Your Honor. Thank you.
 19 THE COURT: Very well. Well, the Court
 20 will find that the defendant does understand the
 21 nature of each of the two offenses; that he does
 22 understand the consequences of his plea of guilty
 23 as to each of the two charged offenses to which he
 24 has pled guilty today; that there is a factual
 25 basis for the guilty plea as to each count -- as

23

1 of 2008?
 2 A. Right. Similar situation. This
 3 time was at her residence also in Boise. And,
 4 again, I didn't protect her, and I didn't do the
 5 things that I needed to do to make sure that, A,
 6 she understood my status.
 7 Q. And you understood you had HIV?
 8 A. Excuse me?
 9 Q. You understood that you had HIV?
 10 A. Yes.
 11 Q. Okay. And you did not advise her
 12 that you had HIV?
 13 A. I didn't make it perfectly clear to
 14 her, correct.
 15 THE COURT: All right. Ms. Fisher?
 16 MS. FISHER: No, Your Honor. From the
 17 State's point of view, that is not an adequate
 18 allocation.
 19 The defendant -- the State in this
 20 case has to be able to prove that the defendant
 21 did not tell her, and she did not know. And this
 22 equivocal, "I didn't make it crystal clear," "I
 23 didn't make it clear," from the State's point of
 24 view, it is an appeal issue, and it's not -- it's
 25 not acceptable.

22

1 to Count II and to Count VII to which he is
 2 pleading guilty; that the defendant believes as to
 3 each of the two guilty pleas that they are in his
 4 best interest; and that each of the two guilty
 5 pleas have been freely, voluntarily, and
 6 intelligently made by the defendant.
 7 The Court will accept the two guilty
 8 pleas. I will direct that they be entered.
 9 I will continue the case for the
 10 pre-sentence investigation, which I will order in
 11 this case. I will also order, pursuant to the
 12 agreement of the parties, that a psychosexual
 13 evaluation be performed; and that pursuant to the
 14 psychosexual -- or to the agreement of the
 15 parties, that that evaluation will be performed by
 16 Dr. Johnston.
 17 And I will set this matter for
 18 sentencing September 11th at 1 o'clock.
 19 And is the State going to provide me
 20 with the order?
 21 MS. FISHER: Yes, Your Honor.
 22 THE COURT: Very well, then. The Court
 23 does have under advisement at this time the
 24 State's motion with regard to use of Idaho Rule of
 25 Evidence 404(b) evidence and 609 evidence.

24

1 Given the defendant's guilty plea,
 2 the Court will take no further action with regard
 3 to that matter and will not be issuing an opinion
 4 on that matter, since, clearly, it has been waived
 5 by the defendant's plea.
 6 MR. GEDDES: Thank you, Judge. There's
 7 only one other thing I would like to advise the
 8 court of. I told the prosecutor. I intend to get
 9 a -- attempt to hire Dr. Beaver to do a
 10 neuropsychological workup on Mr. Thomas.
 11 That will be essentially something
 12 in addition to the psychosexual evaluation. I'm
 13 not going to hide that from the parties. I will
 14 provide that to the parties as soon as I receive
 15 it.
 16 THE COURT: The defendant is certainly
 17 free to obtain a neuropsychological evaluation to
 18 assist the Court in sentencing and provide it to
 19 the Court.
 20 Once that is done, of course, the
 21 State has the right to retain its own expert for
 22 that purpose, if it chooses to do so. That would
 23 be up to the State.
 24 But the defense clearly has the
 25 right to provide that information to assist the

25

1 Court in sentencing.
 2 Anything else?
 3 MR. GEDDES: Not from the defense, Judge.
 4 MS. FISHER: Thank you.
 5 THE COURT: Thank you, Counsel. We will
 6 be in recess.
 7 (Proceedings concluded 10:27 a.m.)
 8 -oo0oo-
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1 REPORTER'S CERTIFICATE

2 STATE OF IDAHO)
3) ss.
4 County of Ada)

5
6 I, NICOLE OMSBERG, Certified Shorthand Reporter
7 in and for the State of Idaho, do hereby certify:

8
9 That I am the reporter who took the proceedings
10 had in the above-entitled action in machine shorthand
11 and thereafter the same was reduced into typewriting
12 under my direct supervision; and

13 That the foregoing reporter's transcript
14 contains a full, true, and accurate record of the
15 proceedings requested by counsel in the above and
16 foregoing cause, which was heard at Boise, Idaho.

17 IN WITNESS WHEREOF, I have hereunto set my hand
18 this ____ day of December 2009.

19
20
21 _____
22 NICOLE OMSBERG
23 CSR, RPR in and for the State
24 of Idaho.
25

APR 07 2010

J. DAVID NAVARRO, Clerk
By SCARLETT RAMIREZ
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

KERRY STEPHEN THOMAS,

Defendant.

Case No. CR-FE-2009-0004448

MEMORANDUM IN SUPPORT OF
DEFENDANT'S RENEWED MOTION
TO WITHDRAW GUILTY PLEA

COMES NOW, KERRY STEPHEN THOMAS, by and through counsel ANTHONY R. GEDDES, Ada County Public Defender's office, and submits the following memorandum of law in support of Defendant's Renewed Motion to Withdraw Guilty Plea, which is now on file with the Court.

I. BRIEF SUMMARY OF FACTS AND APPLICABLE LAW

On June 24, 2009, Mr. Thomas pled guilty to two counts of Transfer of Body Fluid which may Contain the HIV Virus, felony violations of Idaho Code § 39-608. Multiple other counts were dismissed. On September 16, 2009, this Court imposed a fifteen-year sentence upon Mr.

7

Thomas, which consisted of ten (10) years fixed followed by five (5) years indeterminate on both counts. Said sentences were imposed consecutively to each other, and consecutive to the time Mr. Thomas was currently serving. Mr. Thomas timely filed Notice of Appeal, which is now stayed pending the outcome of this motion.

When a criminal defendant moves to withdraw a guilty plea after having been sentenced, the motion may be granted to correct manifest injustice. ICR 33(c); *State v. Lavy*, 121 Idaho 842, 844, 828 P.2d, 871, 873 (1992); *State v. Ballard*, 114 Idaho 799, 801, 761 P.2d 1151, 1153 (1988). If the plea was not taken in compliance with constitutional due process standards, which require that a guilty plea be made voluntarily, knowingly, and intelligently—*Ray v. State*, 133 Idaho 96, 99, 982 P.2d 931, 934; *State v. Detweiler*, 115 Idaho 443, 446, 767 P.2d 286, 289 Ct.App. 1989—then manifest injustice will be established. *State v. Huffman*, 137 Idaho 886, 887, 55 P.3d 879, 880 (Ct.App. 2002). The Idaho Supreme Court has held that a *prima facie* showing of compliance with due process requirements is made when the minimum requirements of ICR 11 have been met. *Ray*, 133 Idaho at 99, 982 P.2d at 934. That rule provides that when the trial court accepts a guilty plea, “the record of the entire proceedings, including reasonable inferences drawn therefrom, must show: . . . the defendant was informed of the consequences of the plea, including minimum and maximum punishments, and other direct consequences which may apply.” ICR 11(c)(2).

It is established in Idaho law that the possibility that a sentence will be made to run consecutive to a prior sentence is a direct consequence of a guilty plea, of which the defendant must be informed in order to ensure that the plea is voluntary, knowing, and intelligent. *See State v. Flummer*, 99 Idaho 567, 585 P.2d 1278 (1978); *Huffman*, 137 Idaho at 887-88, 55 P.3d at 880-81.

Idaho Criminal Rule 11 was applied by the Idaho Supreme Court in *State v. Heredia*, 144 Idaho 95, 156 P.3d 1193 (2007). There, the defendant pleaded guilty to involuntary vehicular manslaughter and, pursuant to statute, was ordered to pay child support to the victim's minor children. The defendant subsequently moved to withdraw his plea, contending that I was invalid because he had not been informed of this consequence before pleading guilty. The Idaho Supreme Court concluded that the child support order was a direct consequence of the plea of which Heredia should have been informed before entering a plea. *Id.* at 98, 156 P.3d at 1196. The Court then addressed, as a separate issue, the State's argument that Heredia did not establish manifest injustice justifying withdrawal of his plea because the defense attorney had argued against child support in his sentencing memorandum and at the sentencing hearing and because, when asked at the sentencing hearing, Heredia did not indicate that he was unaware that child support was a possible consequence. *Id.* Our Supreme Court rejected the State's argument, stating:

The record does not show that the defendant was informed of the consequence of child support. It was not listed as a consequence of the plea when Heredia entered his guilty plea. The only mention of child support in the record is at sentencing. This is not "before a plea of guilty is accepted" as required by ICR 11. Heredia may withdraw his guilty plea.

Id. at 99, 156 P.3d at 1197.

In *State v. Shook*, 144 Idaho 858, 861, 172 P.3d 1133, 1136 (Idaho App. 2007), the Court of Appeals noted:

While *Flummer* was not expressly overruled, the *Heredia* opinion specifically rejects the *Flummer* ruling that a defendant waives any right to relief for the lack of pre-guilty plea notice if he learns at the sentencing hearing of a previously unmentioned consequence of the plea and does not object at that time. We can only conclude that *Heredia* effectively overruled *Flummer sub silentio*, either on the merits or in the implicit recognition of the superseding criminal rule.

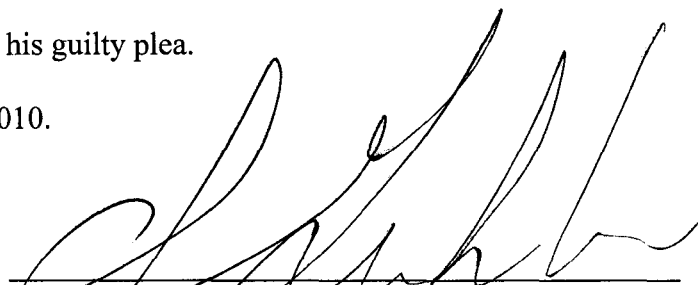
The possibility of a consecutive sentence is a direct consequence of which a defendant must be informed before a guilty plea is accepted under the undisturbed portions of *Flummer* and *Huffman*.

II. CONCLUSION

Mr. Thomas contends that he first became aware of the possibility of consecutive sentences at his sentencing hearing, which is supported by the transcript of his guilty plea. The possibility of a consecutive sentence is clearly a direct consequence of which a defendant must be informed before a guilty plea is accepted.

Under the facts and circumstances outlined above, Mr. Thomas has suffered a manifest injustice and should be allowed to withdraw his guilty plea.

DATED, this 7 day of April 2010.



ANTHONY R. GEDDES
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 4 day of April 2010, I mailed a true and correct copy of the within instrument to:

JEAN M. FISHER
Ada County Prosecutor's Office

by placing said same in the Interdepartmental Mail.



Jacob R. Precht

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT **APR 22 2010**

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA By DAVID NAVARRO, Clerk
[Signature]
DEPUTY

STATE OF IDAHO,)
)
)
Plaintiff,)
)
vs.)
)
KERRY THOMAS,)
)
)
Defendant.)
_____)

Case No. CR-FE-2009-0004448

MEMORANDUM AND ORDER
DENYING MOTION TO WITHDRAW
GUILTY PLEA

Currently before the Court is the Defendant's Renewed Motion to Withdraw Guilty Plea, filed April 7, 2010.

BACKGROUND

Pursuant to negotiations in which additional charges were dismissed, the Defendant pled guilty to two (2) counts of Transfer of Body Fluid Which May Contain the HIV Virus, Felony. On September 16, 2009, the Court imposed a sentence of ten (10) years fixed and five (5) years indeterminate for each count, and set them to run consecutively to each other as well as the sentence he was currently serving.

The Defendant filed a Motion to Modify his sentence, which the Court denied. The Defendant also filed a Motion to Withdraw Guilty Plea. However, the Court denied a hearing on the Motion pending the filing of a brief in support, detailing the factual and legal basis for his Motion. The Defendant did not submit a supporting brief, but appealed the underlying sentence and conviction. With that matter currently in the process of appeal, the State Appellate Public

Defender has apparently requested the Defendant re-file his Motion to Withdraw, in an effort to preserve some meritorious grounds for appeal. This Motion now comes before the Court over 200 days from the time this Court entered judgment on this matter. Although the Court has reservations regarding whether this motion is timely (*State v. Woodbury*, 141 Idaho 547, 548, 112 P.3d 835, 836 (Ct. App. 2005)), it will entertain the Motion at counsel's request.

STANDARD OF REVIEW

A motion to withdraw a guilty plea is governed by Rule 33(c) of the Idaho Rules of Criminal Procedure and must be decided in the sound judicial discretion of the district court. *State v. Freeman*, 110 Idaho 117, 714 P.2d 86 (Ct. App. 1986); *State v. Simons*, 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987). "The scope of that discretion is affected by the timing of the motion." *State v. Mayer*, 139 Idaho 643, 647, 84 P.3d 579 (2004). The defendant bears the burden of proof; and as a general rule a plea withdrawal "may be made only before sentence is imposed," requiring a defendant show a 'just reason' for withdrawing the plea." I.C.R. 33(c); *Mayer*, 139 Idaho 647, 84 P.3d 582; *State v. Acevedo*, 131 Idaho 513, 516, 960 P.2d 196 (App. Ct. 1998). However, if sentence has already been imposed, a more rigorous standard applies and the court may set aside a guilty plea only upon a finding of manifest injustice." *Mayer, supra*; I.C.R. 33(c).

"This distinction in the standards is utilized to avoid encouraging defendants to plead guilty in order to test the potential punishment and then withdraw the plea if the sentence is unexpectedly severe." *Id.* Accordingly, "great deference must be given to the discretion of the district judge who has been present during all the proceedings and has conducted an extensive inquiry prior to accepting a change of plea." *State v. Hawkins*, 117 Idaho 285, 289, 787 P.2d 271 (S. Ct. 1990).

In granting or denying a motion to withdraw a guilty plea, the district court is empowered

with broad discretion, liberal exercise of which is encouraged. *State v. Howell*, 104 Idaho 393, 659 P.2d 147 (Ct.App.1983), *Freeman, supra*. “[T]he proper exercise of such discretion requires identifying the conflicting factors which should bear on the decision, and arriving at a decision based on a well-reasoned consideration of those factors.” *State v. Ballard*, 114 Idaho 799, 761 P.2d 1151 (1988).

DISCUSSION

Because the Defendant filed his motion to withdraw after his sentencing in this case, he must show a “manifest injustice” to warrant withdrawal. *State v. Huffman*, 137 Idaho 886, 887, 55 P.3d 879, 880 (Ct. App. 2002); *Hoover v. State*, 114 Idaho 145, 754 P.2d 458 (Ct. App. 1988).

A “manifest injustice” is found if the plea was not taken in compliance with constitutional standards, which require that a guilty plea be entered voluntarily, knowingly, and intelligently. *Id.* “Voluntariness” requires that the defendant understand the nature of the charges to which he is pleading guilty. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709 (1969); *State v. Dopp*, 124 Idaho 481, 484, 861 P.2d 51, 54 (1993). In addition, in making his decision the defendant must understand his rights being waived, including the right to jury trial, confrontation of witnesses, and self-incrimination. *Huffman, supra*. Finally, the defendant must understand the possible consequences of the guilty plea. *Id.*

It is this final requirement that the Defendant disputes. The Defendant claims his plea was not entered knowingly because he was not informed of the possible sentencing consequences of his guilty plea. Specifically, the Defendant claims he was unaware and uninformed regarding the possibility that his sentences could be imposed consecutively.

There is no requirement that a court inform a defendant of penalty consequences that are collateral or indirect. *Huffman, supra*, citing *Ray v. State*, 133 Idaho 96, 99-101, 982 P.2d 931, 934-36 (1999) (no requirement to inform regarding sex offender registration); *State v. Miller*, 134

Idaho 458, 460, 4 P.3d 570, 572 (Ct.App.2000) (no requirement to inform regarding use of previous conviction in subsequent sentencing determinations). However, a court is required to inform a defendant of all direct consequences of the plea, including the potential maximum punishments. I.C.R. 11(c)(2); *Miller*, 134 Idaho at 460, 4 P.3d at 572. Idaho courts have been clear that the possibility for sentences to be imposed consecutively is a “direct consequence” and potential “maximum punishment,” of which a defendant must be apprised. *Huffman* at 888, 881; *State v. Flummer*, 99 Idaho 567, 585 P.2d 1278 (1978); *State v. Heredia*, 144 Idaho 95, 97, 156 P.3d 1193, 1195 (S. Ct. 2007).¹ “Therefore, if a consecutive sentence has been imposed upon a defendant who pleaded guilty without awareness of this possible consequence, withdrawal of the plea must be allowed.” *Id.*

“The record of the entire proceedings must affirmatively show that the defendant was informed of the[se] consequences before the plea was accepted.” *Heredia*, at 99, 1197; *State v. Rodriguez*, 117 Idaho 292, 294-95, 787 P.2d 278, 280-81 (1990). In addition to this requirement being met by an instruction from the court, a defendant’s knowledge may be shown by statements from defendant’s counsel. *Id.* In this instance, any statements from the Defendant’s counsel would require the Court to hold a hearing on the Motion to Withdraw; wherein the State would call the Defendant’s counsel to testify as to their discussions regarding the possibility of consecutive sentences. No hearing is necessary, however, since the record clearly shows the Court sufficiently informed the Defendant of the potential maximum sentences, including the possibility that they may be imposed consecutively.

The Defendant cites to his guilty plea hearing, alleging the lack of instruction from that proceeding supports his assertion that he was unaware of the possibility that his sentences could

¹ For a full discussion of factors to consider in determining whether a penalty is collateral or direct, see *Ray v. State*, 133 Idaho 96, 99, 982 P.2d 931, 934 (1999).

be imposed consecutively. During the Entry of Plea Hearing, which took place on June 24, 2009, this Court asked Defendant's counsel, in the presence of the Defendant, whether counsel had "adequate time to fully discuss this case and all of its ramifications with [his] client"; as well as whether counsel had "discussed fully with [the Defendant] his rights, defenses, *and the possible consequences* to him of the guilty plea[.]" Counsel affirmed he had, and the Court inquired whether counsel would consent to entry of guilty pleas to both remaining counts, "*each of which* can receive a sentence of up to 15 years in prison[?]" (Plea Transcript, p. 5) Counsel consented, and the Defendant was placed under oath for instruction and questioning. *Id.* The Court then began a litany of questioning with the following questions:

Q: Mr. Thomas, it is my understanding that you are going to be pleading guilty this morning to two counts of intentionally transferring the HIV virus and that you understand that each of those could expose you to a sentence of up to 15 years in prison and a fine up to \$5,000, or both; *and that because sentences can be imposed consecutively in Idaho, you are at risk for imprisonment for up to 30 years, fines of up to \$10,000, or both . . .* Is that correct?

(Plea Trans. at 7 (emphasis added)). The Defendant then responded: "That is correct[.]" indicating his understanding of this potential penalty. Accordingly, not only did the Court fully advise the Defendant that the sentences could be imposed "consecutively," but the Court also did the math for the Defendant and provided an example. In addition, counsel, who drafted the Defendant's current memorandum for this Motion, is obviously aware of the legal requirements for a knowing plea, and he affirmed that he had discussed these consequences with the Defendant. The Court finds that the record of the plea proceedings affirmatively shows that the Defendant was informed that his sentence could be imposed consecutively.

Even assuming, *arguendo*, that the instruction at the plea hearing was insufficient to satisfy the requirements for a knowing plea, the Court had previously warned the Defendant of the possibility of consecutive sentences. On March 19, 2009, when the Defendant came before

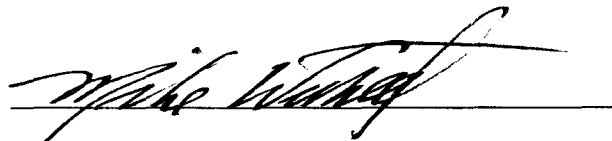
this Court for arraignment on the Indictment, the Court informed the Defendant of his potential maximum penalties, which included the Court's standard instruction that "Because of the fact that sentences can be imposed *consecutively* in Idaho, you are at risk for sentences of up to 105 years in prison, \$35,000 in fines, or both."

On at least two occasions, this Court clearly and unambiguously informed the Defendant of the fact that his sentences could be imposed consecutively. If this is not sufficient notice to the Defendant of the consequences of his plea, including the fact sentences can be imposed consecutively in Idaho, one is given to wonder what is required of the trial courts of this State; and one is also given to wonder how carefully the record was reviewed by counsel before this clearly frivolous claim was made, apparently at the behest of the State Appellate Public Defender. Given this, the Court finds that the record clearly shows that the plea was entered knowingly; and the Court finds there has been no showing of manifest injustice to allow the Defendant to withdraw his plea.

CONCLUSION

In accordance with the foregoing, the Defendant's Motion is **DENIED**.

SO ORDERED AND DATED this 22nd day of April 2010.



MIKE WETHERELL
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of April 2010,

I mailed(served) a true and correct copy of the within
instrument to:

ADA COUNTY PROSECUTOR
INTERDEPARTMENTAL MAIL

ADA COUNTY PUBLIC DEFENDER
INTERDEPARTMENTAL MAIL

J. David Navarro
Clerk of the District Court

By 
Deputy Court Clerk

APR 27 2010

J. DAVID NAVARRO, Clerk
By SCARLETT RAMIREZ
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant
200 W. Front, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO)	
)	
Plaintiff-Respondent,)	
)	
vs.	)	Criminal No. CR-FE-2009-0004448
)	
	)	NOTICE OF APPEAL
KERRY S. THOMAS,)	
)	
Defendant-Appellant.)	
_____)	

TO: THE ABOVE NAMED RESPONDENT, GREG BOWER, ADA COUNTY PROSECUTOR, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Defendant, appeals against the State of Idaho to the Idaho Supreme Court from the final Decision and Order entered against him in the above-entitled action on the 22nd day of April, 2010, the Honorable Mike Wetherell, District Judge, presiding.
2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgment described in paragraph one (1) above is appealable pursuant to I.A.R. 11(c)(1).
3. That the Defendant requests the entire reporter's standard transcript as defined in Rule 25(a), I.A.R.

4. The Defendant also requests the preparation of the following additional portions of the reporter's transcript:

Hearing held: No hearing held
Court Reporter: n/a
Number of Transcript Pages for this hearing estimated: n/a

5. The Defendant requests that the clerk's record contain the following additional documents:

- a. Defendant's Renewed Motion to Withdraw Guilty Plea;
- b. Memorandum in Support of Defendant's Renewed Motion to Withdraw Guilty Plea; and
- c. Memorandum and Order Denying Motion to Withdraw guilty Plea.

6. I certify:

- a) That a copy of this Notice of Appeal has been served on the reporter.
- b) That the Defendant is exempt from paying the estimated transcript fee because he is an indigent person and is unable to pay said fee.
- c) That the Defendant is exempt from paying the estimated fee for preparation of the record because he is an indigent person and is unable to pay said fee.
- d) That the Defendant is exempt from paying the appellate filing fee because he is indigent and is unable to pay said fee.
- e) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

7. That the Defendant anticipates raising issues including, but not limited to:

a) Did the district court abuse its discretion by denying defendant's Motion to Withdraw Guilty Plea?

DATED This 26th day of April, 2010.



ANTHONY R. GEDDES
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, That on the 26th day of April, 2010, I mailed a true and correct copies of the foregoing, NOTICE OF APPEAL to:

LAWRENCE G. WASDEN, ATTORNEY GENERAL, and

HONORABLE JUDGE WETHERELL'S COURT REPORTER

by depositing the same in the Interdepartmental Mail.



Stephanie Martinez

FILED 4/20 PM

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant
200 W. Front St., Ste. 1107
Boise, Idaho 83702
Telephone: (208) 287-7400

APR 27 2010

RECEIVED

APR 27 2010

J. DAVID NAVARRO, Clerk
By DIANE M. OATMAN
DEPUTY

ADA COUNTY CLERK

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO)	
)	
Plaintiff-Respondent,	)	Criminal No. CR-FE-2009-0004448
)	
vs.)	
)	
KERRY S. THOMAS,	)	ORDER APPOINTING STATE
	)	APPELLATE PUBLIC DEFENDER
Defendant-Appellant.	)	ON DIRECT APPEAL
)	

The above-named Defendant, **KERRY S. THOMAS**, being indigent and having heretofore been represented by the Ada County Public Defender's Office in the District Court, and said Defendant having elected to pursue an appeal in the denial of his **Motion to Withdraw Guilty Plea** in above- entitled matter;


IT IS HEREBY ORDERED, AND THIS DOES ORDER, That the Idaho State Appellate Public Defender is appointed to represent the above named Defendant, **KERRY S. THOMAS**, in all matters pertaining to the appeal.

DATED This 27th day of April, 2010.



MIKE WETHERELL
District Judge

ORDER APPOINTING STATE APPELLATE
PUBLIC DEFENDER ON DIRECT APPEAL

FILED
4/18/2011 at 03:11 PM
CHRISTOPHER D. RICH, CLERK OF THE COURT
BY: 
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO
Plaintiff,
vs.
KERRY S THOMAS,
8/7/1964
Defendant.

CASE NO. CR-FE-2009-0004448
ORDER TO TRANSPORT

It appearing that the above-named defendant is in the custody of the Idaho State Board of Correction, and that it is necessary that KERRY S THOMAS be brought before this Court for:
REVIEW HEARING.....Thursday, May 12, 2011 @ 09:00 AM


IT IS THEREFORE ORDERED That the Ada County Sheriff bring the Defendant from the Penitentiary to the Court at said time and on said date;

IT IS FURTHER ORDERED That immediately following said Court appearance the Sheriff return said Defendant to the custody of the Idaho State Penitentiary;

IT IS FURTHER ORDERED That the Idaho State Board of Correction release the said Defendant to the Ada County Sheriff for the purpose of the aforementioned appearance and retake him into custody from the Sheriff upon his return to the Penitentiary.

IT IS FURTHER ORDERED That the Clerk of this Court serve a copy hereof upon the Idaho Department of Corrections and the Ada County Sheriff forthwith and certify to the same.

Dated this 18th day of April, 2011.


MIKE WETHERELL
District Judge

CERTIFICATE OF MAILING


I hereby certify that on 4/18/2011, I Mailed (served) a true and correct copy of the within

instrument to:

DEPARTMENT OF CORRECTION
Central Records
Faxed

ADA COUNTY JAIL
Transport
Faxed

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

APR 18 2011

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHRISTOPHER D. RICH, Clerk
DIANE OATMAN
Deputy

STATE OF IDAHO,

Plaintiff.

vs.

KERRY S THOMAS,

Defendant.

CASE NO: CR-FE-2009-0004448

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Review Hearing Thursday, May 12, 2011 09:00 AM
Judge: Mike Wetherell

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on this date Monday, April 18, 2011.


ADA COUNTY PROSECUTING ATTORNEY
INTERDEPARTMENTAL MAIL

ADA COUNTY PUBLIC DEFENDER
INTERDEPARTMENTAL MAIL

Dated: 4/19/2011

Christopher D. Rich
Clerk of the District Court

By: 
Deputy Clerk

FILED
5/6/2011 at 03:02 PM
CHRISTOPHER D. RICH, CLERK OF THE COURT
BY: 
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO
Plaintiff,
vs.
KERRY S THOMAS,
8/7/1964
Defendant.

CASE NO. CR-FE-2009-0004448
ORDER TO TRANSPORT

It appearing that the above-named defendant is in the custody of the Idaho State Board of Correction, and that it is necessary that KERRY S THOMAS be brought before this Court for:
REVIEW HEARING.....Friday, May 20, 2011 @ 01:30 PM

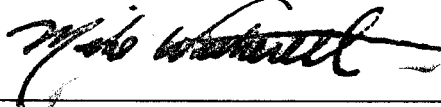
IT IS THEREFORE ORDERED That the Ada County Sheriff bring the Defendant from the Penitentiary to the Court at said time and on said date;

IT IS FURTHER ORDERED That immediately following said Court appearance the Sheriff return said Defendant to the custody of the Idaho State Penitentiary;

IT IS FURTHER ORDERED That the Idaho State Board of Correction release the said Defendant to the Ada County Sheriff for the purpose of the aforementioned appearance and retake him into custody from the Sheriff upon his return to the Penitentiary.

IT IS FURTHER ORDERED That the Clerk of this Court serve a copy hereof upon the Idaho Department of Corrections and the Ada County Sheriff forthwith and certify to the same.

Dated this 6th day of May, 2011.


MIKE WETHERELL
District Judge

CERTIFICATE OF MAILING

I hereby certify that on 5/6/2011, I Mailed (served) a true and correct copy of the within
instrument to:

DEPARTMENT OF CORRECTION
Central Records
Faxed

ADA COUNTY JAIL
Transport
Faxed

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

NO. _____ FILED _____
A.M. 10:45 P.M. _____

MAY 09 2011

CHRISTOPHER D. RICH, Clerk
By LANI BROXSON
DEPUTY

ROBERT R. CHASTAIN
ATTORNEY AT LAW
300 Main, Suite 158
Boise, ID 83702-7728
(208) 345-3110
Idaho State Bar #2765

Attorney for Defendant

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO,)
)
 Plaintiff,)
 vs.)
)
 KERRY S. THOMAS,)
)
 Defendant.)
 _____)

Case No. CRFE 2009-4448
**MOTION TO TRANSPORT
DEFENDANT FOR REVIEW
HEARING**

COMES NOW the above named Defendant, Kerry Thomas, by and through Conflict Ada County Public Defender, Robert R. Chastain, and hereby moves the Court for its Order to transport the Defendant from the custody of Idaho Correctional Center, ICC, to the Ada County Courthouse on May 20, 2011.

This motion is made on the basis that the Defendant's Review Hearing will be called for hearing at the Ada County Courthouse on May 20, 2011, at 1:30 p.m.

The undersigned respectfully requests the Ada County Sheriff bring Mr. Thomas to the Ada County Courthouse by 1:30 p.m. on May 20, 2011.

DATED this 9th day of May, 2011.



ROBERT R. CHASTAIN
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify on the 9th day of May, 2011, I served a true and correct copy of the within and foregoing document upon the individual(s) named below in the manner noted:

- By depositing copies of the same in the United States Mail, postage prepaid, first class.
- By hand delivering copies of the same
- By faxing copies of the same to said attorney(s) at the facsimile number:

Ada County Prosecutor



Robert R. Chastain

MAY 09 2011

CHRISTOPHER D. RICH, Clerk
By LANI BROXSON
DEPUTY

ROBERT R. CHASTAIN
ATTORNEY AT LAW
300 Main, Suite 158
Boise, ID 83702-7728
Telephone: (208) 345-3110
Idaho State Bar #2765

Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,)

Plaintiff,)

vs.)

KERRY S. THOMAS,)

Defendant.)

Case No. CRFE 2009-4448

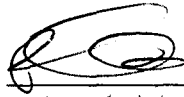
NOTICE OF HEARING

TO: The Ada County Prosecutor and the Clerk of the Court.

NOTICE IS HEREBY GIVEN on ~~May~~ ^{May} 20, 2011, at 1:30 p.m., or as soon thereafter as counsel may be heard, before the above entitled Court, the Defendant's **Review Hearing** will be called up for hearing.

NOTICE OF HEARING

DATED this 6th day of May, 2011.



ROBERT R. CHASTAIN
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify on the 6th day of May, 2011, I served a true and correct copy of the within and foregoing document upon the individual(s) named below in the manner noted:

- By depositing copies of the same in the United States Mail, postage prepaid, first class.
- By hand delivering copies of the same to the office(s) of the attorney(s) indicated below.
- By faxing copies of the same to said attorney(s) at the facsimile number:

Ada County Prosecutor



Robert R. Chastain

NOTICE OF HEARING

5-130
K.H.

ROBERT R. CHASTAIN
ATTORNEY AT LAW
300 Main, Suite 158
Boise, Idaho 83702-7728
Telephone: (208) 345-3110
Idaho State Bar #2765

Attorney for Defendant

N _____ FILED _____
A.M. _____ P.M. 1:30 _____

MAY 19 2011

CHRISTOPHER D. RICH, Clerk
By LANI BROXSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,)	
	)	Case No. CRFE 2009-4448
Plaintiff,)	
vs.	)	MOTION FOR PRODUCTION OF
	)	TRANSCRIPTS OF VARIOUS HEARINGS
)	
KERRY S. THOMAS,)	
)	
Defendant.)	
_____)	

COMES NOW the Defendant, Kerry Thomas, by and through his conflict Ada County Public Defender, Robert R. Chastain, and hereby moves this Court, for its Order that certain typewritten transcripts be prepared of the Defendant's Guilty Plea entered on June 24, 2009; the Sentencing Hearing held on September 16, 2009; and the Motion to Withdraw Guilty Plea on October 6, 2009.

MOTION FOR PRODUCTION OF VARIOUS TRANSCRIPTS, Page 1
C:\Documents and Settings\Terry\My Documents\WPDOCS\FORMS\New Conflict Defender
Cases\Thomas\transcript.mtntthomas.wpd

[Handwritten mark]

These transcripts are necessary to properly prepare to address the legal issues raised by the Idaho Court of Appeals in its opinion remanding this case to the District Court.

Since the Defendant has heretofore been declared indigent, it is respectfully requested the costs of producing said transcripts be at public expense.

Dated this 19th day of May, 2011.



ROBERT R. CHASTAIN
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify on the 19th day of May, 2011, I served a true and correct copy of the within and foregoing document upon the individual(s) named below in the manner noted:

- By depositing copies of the same in the United States Mail, postage prepaid, first class.
- By hand delivering copies of the same to the office(s) of the attorney(s) indicated below.
- By faxing copies of the same to said attorney(s) at the facsimile number: (208) 382-7124
 - Ada County Prosecutor, 200 W. Front Street, Boise, ID, 83702-7300
 - Nicole Omsberg, Court Reporter



Robert R. Chastain

MOTION FOR PRODUCTION OF VARIOUS TRANSCRIPTS, Page 1

C:\Documents and Settings\Terry\My Documents\WPDOCS\FORMS\New Conflict Defender Cases\Thomas\transcript.mtnthomas.wpd

Wetherell052011
Date: 2011/05/20
Wetherell, Mike
Omsberg, Nicole

Division: DC
Session Time: 10:17

Courtroom: CR503

Attorney(s):
atman, Diane

Attorney(s):
Fisher, Jean
Heilly, Heather
White, Jeff

Public Defender(s):

Officer(s):

Court interpreter(s):

Case ID: 0003

Case number: FE0904448
Plaintiff:
Plaintiff Attorney:
Defendant: Thomas, Kerry
Co-Defendant(s):
Pers. Attorney: Chastain, Rob
State Attorney: Fisher, Jean
Public Defender:

2011/05/20

13:38:56 - Operator

Recording:

13:38:56 - New case

Thomas, Kerry

13:39:37 - Judge: Wetherell, Mike

Ct calls and revws case; def present in custody w/counsel

13:39:51 - Judge: Wetherell, Mike

determination of whether or not Mr. Thomas adv'd of consecutive nature of

13:40:23 - Judge: Wetherell, Mike

sentences w/prior convictions

13:40:45 - Pers. Attorney: Chastain, Rob

Filed motion for transcripts

13:40:59 - Judge: Wetherell, Mike

Ct notes transcripts previously prep'd

13:41:36 - State Attorney: Fisher, Jean


attorney general office has all transcripts

13:42:50 - Judge: Wetherell, Mike

July 22 at 10:00 for additional revw

13:43:26 - Operator

Stop recording:

FILED
5/20/2011 at 01:48 PM
CHRISTOPHER D. RICH, CLERK OF THE COURT
BY: 
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO
Plaintiff,
vs.
KERRY S THOMAS,
8/7/1964
Defendant.

CASE NO. CR-FE-2009-0004448
ORDER TO TRANSPORT

It appearing that the above-named defendant is in the custody of the Idaho State Board of Correction, and that it is necessary that KERRY S THOMAS be brought before this Court for:
REVIEW HEARING.....Friday, July 22, 2011 @ 10:00 AM

IT IS THEREFORE ORDERED That the Ada County Sheriff bring the Defendant from the Penitentiary to the Court at said time and on said date;

IT IS FURTHER ORDERED That immediately following said Court appearance the Sheriff return said Defendant to the custody of the Idaho State Penitentiary;

IT IS FURTHER ORDERED That the Idaho State Board of Correction release the said Defendant to the Ada County Sheriff for the purpose of the aforementioned appearance and retake him into custody from the Sheriff upon his return to the Penitentiary.

IT IS FURTHER ORDERED That the Clerk of this Court serve a copy hereof upon the Idaho Department of Corrections and the Ada County Sheriff forthwith and certify to the same.

Dated this 20th day of May, 2011.


MIKE WITHERS
District Judge

NO. _____ FILED 1:38
A.M. P.M.

ROBERT R. CHASTAIN
Attorney at Law
300 Main, Suite 158
Boise, ID 83702-7728
(208) 345-3110
Idaho State Bar 2765

RECEIVED
MAY 19 2011
ADA COUNTY CLERK

MAY 24 2011

CHRISTOPHER D. RICH, Clerk
By DIANE OATMAN
Deputy

Attorney for Defendant


IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,)	
	)	Case No. CRFE 2009-4448
Plaintiff,)	
vs.	)	ORDER FOR PRODUCTION OF
	)	TRANSCRIPTS OF VARIOUS
KERRY S. THOMAS,	)	HEARINGS
)	
Defendant.)	
_____)	

The matter having come before the Court upon the Defendant's motion for preparation of various hearing transcripts, and good cause appearing therefore;

IT IS HEREBY ORDERED that typewritten transcripts of the Defendant's Guilty Plea entered on June 24, 2009; the Sentencing Hearing held on September 16, 2009; and the Motion to Withdraw Guilty Plea on October 6, 2009, be prepared at public expense.

DATED this 24th day of May, 2011.



Hon. Michael E. Wetherell,
District Judge

JUL 14 2011

CHRISTOPHER D. RICH, Clerk
By ELAINE TONG
DEPUTY

ROBERT R. CHASTAIN
ATTORNEY AT LAW
300 Main, Suite 158
Boise, Idaho 83702-7728
Telephone: (208) 345-3110
Idaho State Bar #2765

Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

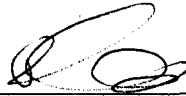
STATE OF IDAHO,)	
	)	Case No. CRFE 2009-4448
Plaintiff,)	
vs.	)	AMENDED NOTICE OF STATUS
	)	CONFERENCE
KERRY S. THOMAS,)	
)	
Defendant.)	
_____)	

COMES NOW the Defendant, Kerry Thomas, by and through his conflict
Ada County Public Defender, Robert R. Chastain, and hereby gives notice that the
Review Hearing set on Friday, July 22, 2011, at 10:00 a.m., before the Honorable
Mike Wetherell, has been reset to Friday, August 5, 2011, at 11:00 a.m.

AMENDED NOTICE OF STATUS CONFERENCE,

C:\Documents and Settings\Terry\My Documents\WPDOCS\FORMS\New Conflict Defender
Cases\Thomas\Amendednoticestatusconf.mtnthomas.wpd

Dated this 14th day of July, 2011.



ROBERT R. CHASTAIN
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify on the 14th day of July, 2011, I served a true and correct copy of the within and foregoing document upon the individual(s) named below in the manner noted:

- By depositing copies of the same in the United States Mail, postage prepaid, first class.
- By hand delivering copies of the same to the office(s) of the attorney(s) indicated below.
- By faxing copies of the same to said attorney(s) at the facsimile number:
 - Jean Fisher, Ada County Prosecutor, 200 W. Front Street, Boise, ID, 83702-7300




Robert R. Chastain

AMENDED NOTICE OF STATUS CONFERENCE,

C:\Documents and Settings\Terry\My Documents\WPDOCS\FORMS\New Conflict Defender Cases\Thomas\Amendednoticestatusconf.mtnthomas.wpd

Page 1

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FILED
8/3/2011 at 01:44 PM
CHRISTOPHER D. RICH, CLERK OF THE COURT
BY: 
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO
Plaintiff,

vs.

KERRY S THOMAS,
8/7/1964

Defendant.

CASE NO. CR-FE-2009-0004448

ORDER TO TRANSPORT

It appearing that the above-named defendant is in the custody of the Idaho State Board of Correction, and that it is necessary that KERRY S THOMAS be brought before this Court for:
REVIEW HEARING.....Friday, August 05, 2011 @ 11:00 AM

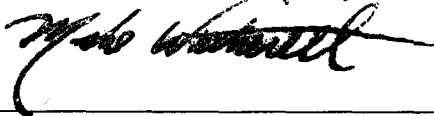
IT IS THEREFORE ORDERED That the Ada County Sheriff bring the Defendant from the Penitentiary to the Court at said time and on said date;

IT IS FURTHER ORDERED That immediately following said Court appearance the Sheriff return said Defendant to the custody of the Idaho State Penitentiary;

IT IS FURTHER ORDERED That the Idaho State Board of Correction release the said Defendant to the Ada County Sheriff for the purpose of the aforementioned appearance and retake him into custody from the Sheriff upon his return to the Penitentiary.

IT IS FURTHER ORDERED That the Clerk of this Court serve a copy hereof upon the Idaho Department of Corrections and the Ada County Sheriff forthwith and certify to the same.

Dated this 3rd day of August, 2011.



MIKE WETHERELL
District Judge

CERTIFICATE OF MAILING

I hereby certify that on 8/3/2011, I Mailed (served) a true and correct copy of the within
instrument to:

DEPARTMENT OF CORRECTION
Central Records
Faxed

ADA COUNTY JAIL
Transport
Faxed

CHRISTOPHER D. RICH
Clerk of the District Court

By 
Deputy Court Clerk

Wetherell080511
Date: 2011/08/05
Wetherell, Mike
Omsberg, Nicole

Division: DC
Session Time: 09:25

Courtroom: CR504

Attorney(s):
Katzman, Diane

Attorney(s):
Katzman, Jean
Katzman, Cathy
Katzman, Heather
Katzman, James

Public Defender(s):

Officer(s):

Court interpreter(s):

Case ID: 0004

Case number: FE0904448
Plaintiff:
Plaintiff Attorney:
Defendant: Thomas, Kerry
Co-Defendant(s):
Pers. Attorney: Chastain, Rob
State Attorney: Fisher, Jean
Public Defender:

2011/08/05

11:01:24 - Operator

Recording:

11:01:24 - New case

Thomas, Kerry

11:01:48 - Judge: Wetherell, Mike

Ct calls case; def present in custody w/ counsel -- Ct of appeal decision --

11:02:09 - Judge: Wetherell, Mike
Mr Thomas being aware of consecutive sentence involving prev sentence

11:02:31 - Pers. Attorney: Chastain, Rob
has now rec'd all transcripts -- prep'd to set a hearing/briefing

11:02:56 - State Attorney: Fisher, Jean
ready to set hearing date

11:05:53 - Judge: Wetherell, Mike
Nov 2, 2011 at 10:00 for hearing

11:06:10 - Judge: Wetherell, Mike
Aug 29 for brief for def -- Sept 19 for State response -- Oct 3 for reply

11:06:33 - Judge: Wetherell, Mike
brief

11:07:09 - State Attorney: Fisher, Jean
State will be filing waiver of atty/client priv


11:07:28 - Pers. Attorney: Chastain, Rob
will be objecting

11:11:21 - Judge: Wetherell, Mike
Motn to Waive Atty/Client Priv to be heard Aug 24 at 3:00

11:12:16 - Judge: Wetherell, Mike
Ct adv counsel re: copy of hearing before Ct of Appeals

11:12:31 - Pers. Attorney: Chastain, Rob
will provide Ct with copy of his transcript

11:12:43 - Operator
Stop recording:

FILED
8/5/2011 at 11:14 AM
CHRISTOPHER D. RICH, CLERK OF THE COURT
BY: 
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO
Plaintiff,
vs.
KERRY S THOMAS,
8/7/1964
Defendant.

CASE NO. CR-FE-2009-0004448
ORDER TO TRANSPORT

It appearing that the above-named defendant is in the custody of the Idaho State Board of Correction, and that it is necessary that KERRY S THOMAS be brought before this Court for:
HEARING SCHEDULED.....Wednesday, August 24, 2011 @ 03:00 PM

IT IS THEREFORE ORDERED That the Ada County Sheriff bring the Defendant from the Penitentiary to the Court at said time and on said date;

IT IS FURTHER ORDERED That immediately following said Court appearance the Sheriff return said Defendant to the custody of the Idaho State Penitentiary;

IT IS FURTHER ORDERED That the Idaho State Board of Correction release the said Defendant to the Ada County Sheriff for the purpose of the aforementioned appearance and retake him into custody from the Sheriff upon his return to the Penitentiary.

IT IS FURTHER ORDERED That the Clerk of this Court serve a copy hereof upon the Idaho Department of Corrections and the Ada County Sheriff forthwith and certify to the same.

Dated this 5th day of August, 2011.


MIKE WETHERELL
District Judge

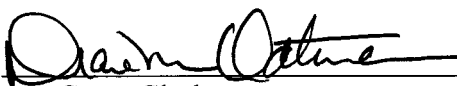
CERTIFICATE OF MAILING

I hereby certify that on 8/5/2011, I Mailed (served) a true and correct copy of the within instrument to:

DEPARTMENT OF CORRECTION
Central Records
Faxed

ADA COUNTY JAIL
Transport
Faxed

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

AUG 12 2011

CHRISTOPHER D. RICH, Clerk
By ELAINE TONG
DEPUTY

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24
00

GREG H. BOWER
Ada County Prosecuting Attorney

Jean M. Fisher
Deputy Prosecuting Attorney
200 W. Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)
)
Plaintiff,)
)
vs.)
)
KERRY STEPHEN THOMAS,)
)
Defendant.)
_____)

Case No. CR-FE-2009-0004448
STATE'S MOTION TO
WAIVE ATTORNEY-CLIENT
PRIVILEGE

COMES NOW, Jean M. Fisher, Deputy Ada County Prosecutor, and files this motion requesting that the Court waive the attorney – client privilege between the Defendant and his original attorney, Anthony Geddes. This motion requests a waiver on the limited issue of communication between the Defendant and Mr. Geddes as it relates to communications to the Defendant regarding the plea negotiations between the prosecuting attorney for the State of Idaho and the Defendant in the underlying case.

The Defendant has filed an appeal with the Idaho Court of Appeals stating that he did not make a knowing, voluntary or intelligent plea before Judge Wetherell because he was not advised of the direct consequences that his sentence could run consecutive to the sentence he was currently serving from a parole violation. The Court of Appeals vacated the conviction and has remanded the case back to the District Court for further proceedings.


The State urges the Court to waive the attorney-client privilege regarding this limited inquiry with his then defense counsel. In the appellate brief filed on behalf of Thomas, Thomas asserts . . . “the court inquired into whether Mr. Thomas was presently on probation or parole, to which he answered not as of last Friday because his parole was revoked. (Change of Plea, tr., p. 9) However, the court did not then use this opportunity as a springboard to explain to Mr. Thomas that his sentence could run consecutively to the sentence he was then serving. The conspicuous absence of this advice would itself lead Mr. Thomas to believe that this was not a possibility.” (Brief of Appellant, p. 16) Taken at face value from the record, this would appear to be accurate. However, the State is absolutely certain from the history of this case, the extensive negotiations between Thomas’ original defense counsel, that the Defendant clearly and unambiguously understood that the State’s plea negotiations fully disclosed that Thomas’ penitentiary sentences would run consecutive to the parole violation.

The State respectfully requests that the attorney – client privilege as to the plea

negotiations between counsel of record, Anthony Geddes, and the Defendant be waived for the limited purpose of this motion.

DATED this 11 day of August, 2011.

GREG H. BOWER
Ada County Prosecuting Attorney



Jean M. Fisher
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th of August, 2011, I served a true and correct copy of the foregoing Motion to Waive Attorney-Client Privilege to Rob Chastain, Attorney at Law, 300 Main Street, Suite 158, Boise ID 83702 by depositing copies of same in the US Mail.



AUG 22 2011

CHRISTOPHER D. RICH, Clerk
By **ELAINE TONG**
DEPUTY

37
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124
3pm

Robert R. Chastain
Attorney at Law
300 Main, Suite 158
Boise, Idaho 83702-7728
Telephone: (208) 345-3110
Idaho State Bar #2765

Attorney for the Defendant

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO,)	
	)	Case No.: CRFE 2009-4448
Plaintiff,)	
	)	NOTICE OF INTENT TO
vs.	)	ASSERT ATTORNEY-CLIENT
	)	P R I V I L E G E A N D
KERRY STEPHEN THOMAS,	)	OBJECTION TO STATE'S
	)	MOTION TO WAIVE
Defendant.	)	A T T O R N E Y - C L I E N T
_____	)	P R I V I L E G E

COMES NOW Defendant, by and through his attorney of record, Robert R. Chastain, and hereby provides notice of his intent to assert his attorney-client privilege as to Tony Geddes; in addition, Defendant further objects to the State's Motion to Waive Attorney-Client Privilege.

Defendant supports his objection with the following memorandum.

MEMORANDUM

The State moves this Court to “waive the attorney -- client privilege between the defendant and his original attorney, Anthony Geddes . . . on the limited issue of communication between the Defendant and Mr. Geddes as it relates to communications to the Defendant regarding the plea negotiations between the prosecuting attorney for the State of Idaho and the Defendant in the underlying case.”

However, the Court cannot “waive” a right that the Court does not possess. It is “the client [who] is the holder of the privilege. Accordingly, only the client can waive the privilege.” *State v. Iwakiri*, 106 Idaho 618, 621 (1984). “The lawyer-client privilege allows a client to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating rendering professional legal services to the client.” *Star Phoenix Min. Co. v. Hecla Min. Co.*, 130 Idaho 223, 232 (1997). The requested “waiver” clearly falls within the scope of the rule, as the relevant communications, if any, obviously involved communications made for the purpose of “facilitating rendering professional legal services to the client.” This case does not involve a claim of ineffective assistance of counsel that could potentially permit Mr. Geddes to defend against the claim of ineffective assistance.

Rather, this case involves only the issue whether “**the record of the entire proceedings** . . . affirmatively show[s] that the defendant was informed of a direct

consequence [of pleading guilty] before the plea [was] accepted.” *State v. Thomas* (2011) (unpublished) (emphasis added) (citing *State v. Heredia*, 144 Idaho 95, 97 (2007) (quoting I.C.R. 11)). Criminal Rule 11 states that “**Before a plea of guilty is accepted, the record** of the entire proceedings, including reasonable inferences drawn therefrom, **must show . . . [t]he defendant was informed of the consequences of the plea.**” (emphasis added).

Therefore, even if the State could establish that this Court could, or should, “waive” the client’s privilege, the State’s motion is untimely. The entire record’s sufficiency depends on the contents of the record “before” a guilty plea is accepted. The State is attempting to supplement the record *after* the plea was accepted. Therefore, the State’s request is irrelevant, because the inquiry is limited to the contents of the record *before* the plea was accepted. It is the contents of the *record* that is relevant to this inquiry, *not* all of the facts that existed at the time the plea was accepted. The question is, *before* the plea was entered, what facts existed *on the record*? Since the plea already been entered, any facts on the record after the plea are irrelevant.

WHEREFORE, Mr Thomas respectfully requests the Court to deny the State’s Motion.

DATED this 22 day of August, 2011.



ROBERT R. CHASTAIN
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify on the 22 day of August, 2011, I served a true and correct copy of the within and foregoing document upon the individual(s) named below in the manner noted:

- By depositing copies of the same in the United States Mail, postage prepaid, first class.
- By hand delivering copies of the same
- By faxing copies of the same to said attorney(s) at the facsimile number:

Ada County Prosecutor



Robert R. Chastain

<u>Time</u>	<u>Speaker</u>	<u>Note</u>
<u>3:07:17 PM</u>	Ct	FE0904448 Kerry Thomas -- Calls case; def present in custody w/counsel Mr. Chastain
<u>3:07:59 PM</u>	Ms. Fisher	req't'g waiver of limited portion w/ref to plea negotiation -- State believes def knew sentencing was going to run consecutively
<u>3:11:53 PM</u>	Rob Chastain	response -- attorney/client priv
<u>3:13:42 PM</u>	Jean Fisher	rebuttal
<u>3:15:26 PM</u>	Ct	response -- def not proceeding under premise his counsel erred
<u>3:19:26 PM</u>	Jean Fisher	inquires w/Ct's responses interspersed re: motion to w/draw
<u>3:22:13 PM</u>	Ct	adv counsel will not grant motion to waive atty/client priv
<u>3:22:34 PM</u>	Ct	Aug 29 -- def; Sept 19, State -- Oct 3 reply brief -- hearing Nov 2
<u>3:23:40 PM</u>		End of Case

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Robert R. Chastain
Attorney at Law
300 Main, Suite 158
Boise, Idaho 83702-7728
Telephone: (208) 345-3110
Idaho State Bar #2765

Attorney for the Defendant

NO. _____ FILED 253
A.M. _____ P.M.

AUG 29 2011

CHRISTOPHER D. RICH, Clerk
By MAURA OLSON
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
)
 KERRY STEPHEN THOMAS,)
)
 Defendant.)
 _____)

Case No.: CRFE 2009-4448
DEFENDANT'S MEMORANDUM

COMES NOW the Defendant, Kerry Stephen Thomas, by and through
conflict Ada County Public Defender, Robert R. Chastain, and hereby submits the
following Memorandum, pursuant to the Court's request, and ultimately in support
of his Motion to Withdraw his Guilty Plea.

MEMORANDUM

The issue before this Court involves a motion to withdraw Kerry Thomas' guilty plea pursuant to Rule 33(c) of the Idaho Criminal Rules. Rule 33(c) provides:

Withdrawal of plea of guilty. A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; **but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw defendant's plea.**

Defendant's motion to withdraw his guilty plea was made after the court imposed sentence, triggering the manifest injustice standard. In *State v. Huffman*, the Idaho Court of Appeals explained when manifest injustice may be found:

Manifest injustice will be found if the plea was not taken in compliance with constitutional due process standards, which require that a guilty plea be entered voluntarily, knowingly, and intelligently. Compliance with these standards turns upon whether: (1) the plea was voluntary in the sense that the defendant understood the nature of the charges and was not coerced; (2) the defendant knowingly and intelligently waived his rights to a jury trial, to confront adverse witnesses, and to avoid self-incrimination; and (3) the defendant understood the consequences of pleading guilty.

137 Idaho 886, 887 (2002) (internal citations omitted) (emphasis added).

In *Huffman*, the question was "whether the possibility that the defendant's sentence will be made to run consecutively to a prior sentence is a direct consequence of which the defendant must be informed in order to ensure that a guilty plea is voluntary, knowing, and intelligent." *Id.* The *Huffman* Court concluded that "if a consecutive sentence has been imposed upon a defendant who pleaded guilty without awareness of this possible consequence, [that the defendant's sentence

will be made to run consecutively to a prior sentence,] withdrawal of the plea must be allowed." *Id.* (emphasis added).

It is clear from the State's initial appellate briefing that it intends to argue that Defendant was adequately informed of the consequences of pleading guilty, because of Defendant's prior experience with the criminal justice system. State's Br. 13. However Mr. Thomas contends that the record is clear that this Court's cautionary statement to him would cause any non-lawyer (and perhaps even many lawyers) to believe that he was subject only to spending thirty years in prison from the date of the sentence. Specifically, this Court stated:

Mr. Thomas, it is my understanding that you are going to be pleading guilty this morning to two counts of intentionally transferring the HIV virus (sic) and that you understand that each of those could expose you to a sentence of up to 15 years in prison and a fine up to \$5,000, or both; and that *because sentences can be imposed consecutively in Idaho, you are at risk for imprisonment for up to 30 years*, fines of up to \$10,000, or both, and restitution should that be appropriate to any victim in this case. Is that correct?

(emphasis added).¹

The key point is that Mr. Thomas was told that, due to the fact that sentences can be consecutive in Idaho, he could face thirty years. This statement is misleading, and with all due respect to this Court, incorrect. Rather, the actual risk from the potential for consecutive sentences was that Defendant could spend thirty-three years in prison.

¹This Court also stated at the beginning of the sentencing proceedings that "The defendant is, thus, subject to a sentence of up to 30 years in prison, a \$10,000 fine, or both." Tr. p. 5 (emphasis added).

At a minimum, the statement of the effect of consecutive sentences was ambiguous. Perhaps this Court intended to state that Defendant was at risk of “imprisonment for up to 30 years *for these offenses only*.” However, that was not what this Court told Mr. Thomas. This Court told Mr. Thomas he was at risk for imprisonment for only up to 30 years, when he was actually at risk for imprisonment 30 years consecutive to his existing prison sentence.

If this Court intended to inform Mr. Thomas he was actually at risk for imprisonment of up to 33 years, then the actual advisal was so ambiguous that it cannot reasonably be argued that his awareness of the effects of his guilty plea were close to meeting the required constitutional standards.

CONCLUSION

For the foregoing reasons, this Court should find that Mr. Thomas, was not properly advised; that said failure amounted to manifest injustice, and allow Mr. Thomas to withdraw his guilty plea and proceed to Jury Trial on the original indictment.

DATED this 29th day of August, 2011.




ROBERT R. CHASTAIN
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify on the 29th day of August, 2011, I served a true and correct copy of the within and foregoing document upon the individual(s) named below in the manner noted:

- By depositing copies of the same in the United States Mail, postage prepaid, first class.
- By hand delivering copies of the same
- By faxing copies of the same to said attorney(s) at the facsimile number:

Ada County Prosecutor



Robert R. Chastain

SEP 16 2011

CHRISTOPHER D. RICH, Clerk
By ELAINE TONG
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Jean M. Fisher
Deputy Prosecuting Attorney
200 W. Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
 KERRY STEPHEN THOMAS,)
)
 Defendant.)
 _____)

Case No. CR-FE-2009-0004448

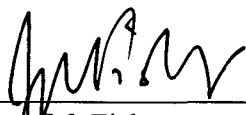
**STATE'S MOTION TO
CORRECT SENTENCING
PURSUANT TO I.C.R. 35**

COMES NOW, Jean M. Fisher, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and files this Motion to Correct the defendant's sentence pursuant to ICR 35. In this case, the State and counsel for the defendant arrived at a mutually agreeable negotiation that consisted of the defendant pleading guilty to two of the seven counts contained in the indictment with the sentences running consecutive to each other (Transcript of Guilty Plea). The State, however, did not place a last condition (consecutive to the parole violation) on the record at the time of Thomas' guilty plea. The defendant was sentenced on June 24, 2009. The court ordered the defendant to serve fixed time consecutive to his parole violation.

The defendant appealed his conviction stating that he was not told by the Court that his sentence could run consecutive to his parole violation. The record supports Thomas' argument. The State respectfully requests pursuant to ICR 35 that Thomas' sentence be corrected in the manner consistent with the negotiated plea agreement that was placed on the record at the time that Thomas pled guilty to two counts of Knowingly Transfer of the HIV Virus. The record clearly indicates that Thomas could face a maximum sentence of up to fifteen years on each count that could run consecutive to each other. In this case, the defendant received fifteen years on each count with ten years fixed, with each running consecutive for a total of thirty years with twenty years fixed. Additionally, the State requests that the time he was ordered to serve reflect that it is to run concurrent to the parole violation that Thomas was ordered to serve by the Idaho Parole Commission in a separate hearing.

Respectfully submitted this 16th day of September 2011.

GREG H. BOWER
Ada County Prosecuting Attorney

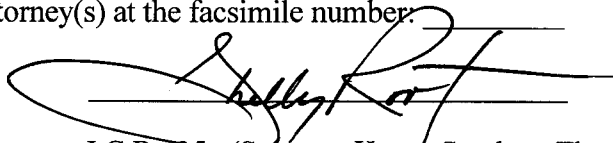


Jean M. Fisher
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I **HEREBY CERTIFY** that on this 16 day of September 2011, I caused to be served, a true and correct copy of the foregoing to **Robert Chastain, Attorney at Law, 300 Main St., Ste. 158, Boise, ID 83702-7728** in the manner noted:

- By depositing copies of the same in the United States mail, postage prepaid, first class.
- By informing the office of said individual(s) that said copies were available for pickup at the Office of the Ada County Prosecutor.
- By faxing copies of the same to said attorney(s) at the facsimile number:



SEP 16 2011

CHRISTOPHER D. RICH, Clerk
By ELAINE TONG
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Jean M. Fisher
Deputy Prosecuting Attorney
200 W. Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
 KERRY STEPHEN THOMAS,)
)
 Defendant.)
 _____)

Case No. CR-FE-2009-0004448
**STATE'S BRIEF OBJECTING
TO DEFENDANT'S MOTION
TO WITHDRAW GUILTY PLEA**

COMES NOW, Jean M. Fisher, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and files this objection to the defendant's motion to withdraw his guilty plea. In March of 2009, the defendant was indicted by an Ada County Grand Jury on seven counts of Knowingly Transfer of the HIV Virus. The defendant was arraigned on March 19, 2009. On May 7, 2009, the State filed an Information Part II charging that Thomas was a repeat offender, and more specifically, a repeat sexual offender. Thomas had previously been charged of rape (statutory) and Knowing Transfer of HIV in 1990 to which he pled guilty to the rape. He went to prison and was released. In 1996, Thomas was charged again with Knowing Transfer of the HIV

Virus. He was convicted by a jury and sentenced to fifteen years with seven fixed. He was again released. At the time of his arrest, Thomas had approximately three years left on his parole from the 1996 conviction that he was serving penitentiary time for after a parole revocation hearing based on the new charges.

During plea negotiations, the State and counsel for the defendant arrived at a mutually agreeable negotiation that consisted of the defendant pleading guilty to two of the seven counts contained in the indictment with the sentences running consecutive to each other and to the parole violation. Unfortunately, the State did not place the last condition (consecutive to the parole violation) on the record at the time of Thomas' guilty plea. The defendant was sentenced on June 24, 2009. The court ordered the defendant to serve fixed time consecutive to his parole violation.

The defendant appealed his conviction stating that he was not told by the Court that his sentence could run consecutive to his parole violation. However, Thomas *does concede that he knew at the time that he pled guilty to the two counts of Knowing Transfer of HIV that his sentence could run consecutive to each count for a thirty year aggregate sentence.* The Court of Appeals vacated the district court's order denying Thomas' motion to withdraw his guilty plea based on the record that Thomas was not told in court that his sentence could, in fact, run consecutive to his parole violation.

Under ICR 33 (c), a withdrawal of a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; **but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the defendant's plea.** The State acknowledges after listening to the record that Thomas was not told in Court that his sentences could run consecutive to his parole violation.

However, the State does not believe that this claim, considered in the totality of the record that does exist, that it amounts to “manifest injustice.” In the unpublished opinion of the Court of Appeals, the Court itself states by footnote that “the defendant on appeal acknowledged that if he [Thomas] had received concurrent treatment with the prior sentence then there would be no prejudice, i.e. no manifest injustice, and his claim would be rendered moot.” The defendant knowingly, intelligently, and voluntarily pled guilty to two counts of Knowing Transfer of the HIV virus. He was told in open court that he could receive consecutive sentences as to these two counts. Should the court follow the Court of Appeals footnoted suggestion of sentencing Thomas to concurrent time on the parole violation, Thomas cannot show prejudice.

The defendant at the time he pled guilty in this case was clearly and unambiguously told that his sentence could run consecutive to each other. Additionally, after the defendant pled guilty, the State was asked if it was satisfied with the defendant’s factual basis. The State was not satisfied and Thomas had to provide additional elements stating that he, in fact, was HIV positive and that he did not tell the victim of his medical status before he engaged in sexual intercourse with her (Transcript of Guilty Plea, pages 22 – 24). Thomas corrected his own record and stated that in November and December of 2008 he never told his victim of his medical status. In so doing, Thomas clearly illustrated that his guilty plea was not only knowingly, but voluntarily and intelligently as well.

Given Thomas’ own statements at the time of the guilty plea, it would be draconian and manifestly unjust to the State and to the victim to allow Thomas to now withdraw his guilty plea. The State understands that a defendant’s due process rights require that a guilty plea be made knowingly, voluntarily and intelligently. Thomas’ guilty pleas to the two counts of HIV on June 24, 2009 were all of those. The State requests that his motion to withdraw the guilty plea be

denied and that his sentence be corrected in that his time to serve on the case before this court run concurrent to the time he was ordered to serve on the parole violation from his second felony sex conviction.

Respectfully submitted this 16th day of September 2011.

GREG H. BOWER
Ada County Prosecuting Attorney

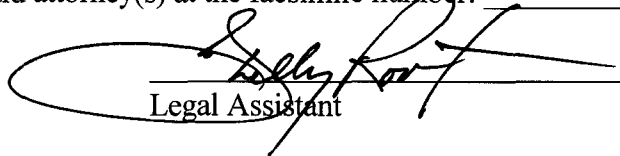


Jean M. Fisher
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16 day of September 2011, I caused to be served, a true and correct copy of the foregoing to **Robert Chastain, Attorney at Law, 300 Main St., Ste. 158, Boise, ID 83702-7728** in the manner noted:

- By depositing copies of the same in the United States mail, postage prepaid, first class.
- By depositing copies of the same in the Interdepartmental Mail.
- By informing the office of said individual(s) that said copies were available for pickup at the Office of the Ada County Prosecutor.
- By faxing copies of the same to said attorney(s) at the facsimile number: _____



Legal Assistant

OCT 03 2011

CHRISTOPHER D. RICH, Clerk
By ELAINE TONG
DEPUTY

Robert R. Chastain
Attorney at Law
300 Main, Suite 158
Boise, Idaho 83702-7728
Telephone: (208) 345-3110
Idaho State Bar #2765

Attorney for the Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

KERRY STEPHEN THOMAS,

Defendant.

)
) Case No.: CRFE-2009-0004448
)
) D E F E N D A N T ' S
) S U P P L E M E N T A L
) M E M O R A N D U M I N
) S U P P O R T O F M O T I O N T O
) W I T H D R A W G U I L T Y P L E A
)
)

COMES NOW Defendant, above-named, and hereby submits the following
supplemental memorandum in support of his Motion to Withdraw his Guilty Plea.

MEMORANDUM

The State concedes that “after listening to the record that Thomas was not told in Court that his sentences could run consecutive to his parole violation.” State’s Br. 2. The State again acknowledged this concession in its Rule 35 Motion, stating “The defendant appealed his conviction stating that he was not told by the Court that his sentence could run consecutive to his parole violation. **The record supports Thomas’ argument.**” P. 2 (emphasis added). Therefore, the State essentially stipulates that the record does not establish that the plea was entered “knowingly, voluntarily, and intelligently.” As noted in Defendant’s opening brief, the *record* is the only source from which to infer facts regarding whether the guilty plea was knowing, voluntary, and intelligent. In light of the State’s concession, the case law cited in Defendant’s opening brief¹ requires that the issue be narrowed to whether manifest injustice resulted from the guilty plea.

In this case, the most critical point is that the concepts of “prejudice” and “manifest injustice” are not equivalent. The State invites this Court to reduce the Defendant’s sentence from thirty-three years to thirty years, which the State claims would eliminate any prejudice to the defendant. With due respect to the Court of Appeals’

¹Particularly, *State v. Huffman*, 137 Idaho 886 (2002).

footnote, the issue of “prejudice” is a red herring. The only issue is whether there was “manifest injustice.” If so, Defendant must be permitted to withdraw his guilty plea.²

The *Huffman* court was unequivocal about the fact that a defendant must be permitted to withdraw his guilty plea if it was not voluntary, knowing, and intelligent. The State concedes that the record cannot support this requirement. The only reason the *Huffman* court did not permit withdrawal of the plea was that the record reflected that the defendant *had* to know the consequences of his plea. In other words, *Huffman* did not permit withdrawal of the plea because it found that the record supported the position that the plea was entered knowingly, intelligently, and voluntarily.

This case, however, involves the opposite facts: the State *concedes* that the record does not reflect Defendant’s knowledge regarding the consequences of Defendant’s plea. Therefore, the only issue is whether manifest injustice resulted from Defendant’s lack of knowledge, and that question has been answered in the affirmative by *Huffman*. According to binding precedent, as a matter of law, a guilty plea that is not knowingly entered constitutes manifest injustice, and the defendant must be permitted to withdraw the guilty plea.

²

The State’s brief seems to imply that the decision to permit withdrawal of the guilty plea is a matter of discretion. State’s Br. 2 (“**to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the defendant’s guilty plea.**”) (emphasis in original).

The case law is clear, however, that in cases such as this the defendant must be permitted to withdraw his plea. *Huffman*, 137 Idaho at 887-88 (“the Court held that the possibility that a sentence will run consecutively is a potential consequence of a guilty plea that must be disclosed to the defendant. Therefore, **if a consecutive sentence has been imposed upon a defendant who pleaded guilty without awareness of this possible consequence, withdrawal of the plea must be allowed.**”) (footnote, citations omitted) (emphasis added).

CONCLUSION

The parties agree that the record is inadequate to establish that the plea was entered with knowledge of the direct consequences of a guilty plea. The case law is clear that manifest injustice results from a plea that was entered without the requisite level of knowledge. The case law also establishes that, under those facts, no discretion exists to deny the motion to withdraw the guilty plea. Therefore, Defendant must be permitted to withdraw his guilty plea and must be granted a trial on the merits of his case.

For the foregoing reasons, this Court should GRANT Defendant's motion to withdraw his guilty plea.

DATED this 30 day of October, 2011.



ROBERT R. CHASTAIN
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify on the 30 day of October, 2011, I served a true and correct copy of the within and foregoing document upon the individual(s) named below in the manner noted:

- By depositing copies of the same in the United States Mail, postage prepaid, first class.
- By hand delivering copies of the same
- By faxing copies of the same to said attorney(s) at the facsimile number:

Ada County Prosecutor



Robert R. Chastain

57
2
A.

NO. _____
A.M. _____ FILED _____ P.M. _____

OCT 05 2011

CHRISTOPHER D. RICH, Clerk
By MAURA OLSON
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Jean M. Fisher
Deputy Prosecuting Attorney
200 W. Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)
)
Plaintiff,)
)
vs.)
)
KERRY STEPHEN THOMAS,)
)
Defendant.)
_____)

Case No. **CR-FE-2009-0004448**
**STATE'S REPLY BRIEF TO
DEFENDANT'S
SUPPLEMENTAL
MEMORANDUM IN
SUPPORT OF MOTION TO
WITHDRAW GUILTY PLEA**

COMES NOW, Jean M. Fisher, and files this reply brief to the defendant's supplemental memorandum in support of their motion to withdraw his guilty plea.

During plea negotiations, the State and counsel for the defendant arrived at a mutually agreeable negotiation that consisted of the defendant pleading guilty to two of the seven counts contained in the indictment with the sentences running consecutive to

0

each other and to the parole violation. That negotiation was clearly and unequivocally placed on the record. The defendant was questioned about the plea negotiation and was informed that by pleading guilty to two counts of Knowingly Transfer of the HIV virus, he subjected himself up to a unified consecutive sentence of thirty years. The plea negotiation made between the State and the defendant *could not have been clearer* in that regard. The defendant was sentenced on June 24, 2009. The court ordered the defendant to serve fixed time consecutive sentences for the two counts *in addition* to his parole violation.

Thomas cannot now state that his plea to the two counts was not voluntary, knowing or intelligent. Although the State concedes that he was not warned that his pleas of guilty could subject him to consecutive time to his parole, the plea to the two counts in *in the absence of ~~it~~ corrected by state. -* and of themselves ~~with~~ the consecutive sentence explanation was knowing, voluntary and intelligent. Thomas cannot claim prejudice if the court corrects his sentence in the manner negotiated and placed on the record. The Court of Appeals clearly articulated that conclusion in the footnote of the court's decision.

Under ICR 33 (c), a withdrawal of a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; **but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the defendant's plea.** The State acknowledges after listening to the record that Thomas was not told in Court that his sentences could run consecutive to his parole violation. However, the State does not believe that in this case

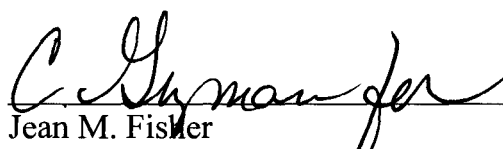
under the plea agreement that Thomas did know and acknowledge in open court that his claim now amounts to “manifest injustice.” In the unpublished opinion of the Court of Appeals, the Court itself states by footnote that “the defendant on appeal acknowledged that if he had received concurrent treatment with the prior sentence then there would be no prejudice, i.e. no manifest injustice, and his claim would be rendered moot.” The obvious remedy for this court is to run the defendant’s two newest charges of Knowing Transfer of HIV concurrent with his last conviction for Knowing Transfer of HIV. The defendant at the time he pled guilty in this case was clearly and unambiguously told that his sentence could run concurrent. Additionally, after the defendant pled guilty, the State was asked if it was satisfied with the defendant’s factual basis. The State was not satisfied and Thomas had to provide additional elements stating that he, in fact, was HIV positive and that he did not tell the victim of his medical status before he engaged in sexual intercourse with her (Transcript of Guilty Plea, pages 22 – 24). Thomas corrected his own record and stated that in November and December of 2008 he never told his victim of his medical status. In so doing, Thomas clearly illustrated that his guilty plea was not only knowingly, but voluntarily and intelligently as well.

In *State v. Huffman*, 137 Idaho 886 (2002), the Appeals court did not allow Huffman to withdraw his plea because they looked at the entirety of the record and concluded that Huffman had to know the consequences of his plea. In this case, the court can look at the entirety of Thomas’ plea and the negotiations that were placed on the record. The Court can further review its own record and clearly see that Thomas was

unequivocally told that his sentences could run together on each count. If the Thomas is not subjected to consecutive time with the parole violations, he cannot in good faith argue to this court that he did not make a knowing, intelligent and voluntary plea because the record would not support such a conclusion.

Respectfully submitted this 8th day of October 2011.

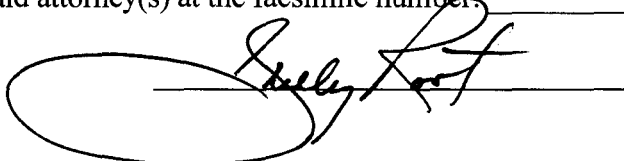
GREG H. BOWER
Ada County Prosecuting Attorney



Jean M. Fisher
Ada County Deputy Prosecutor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5 day of October 2011, I caused to be served, a true and correct copy of the foregoing to **Robert Chastain, Attorney at Law, 300 Main St., Ste. 158, Boise, ID 83702-7728** in the manner noted:

- By depositing copies of the same in the United States mail, postage prepaid, first class.
- By informing the office of said individual(s) that said copies were available for pickup at the Office of the Ada County Prosecutor.
- By faxing copies of the same to said attorney(s) at the facsimile number: _____



FILED
10/28/2011 at 08:41 AM
CHRISTOPHER D. RICH, CLERK OF THE COURT
BY: 
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO

Plaintiff,

vs.

KERRY S THOMAS,
8/7/1964

Defendant.

CASE NO. CR-FE-2009-0004448

ORDER TO TRANSPORT

It appearing that the above-named defendant is in the custody of the Idaho State Board of Correction, and that it is necessary that KERRY S THOMAS be brought before this Court for:

HEARING SCHEDULED.....Wednesday, November 02, 2011 @ 10:00 AM


IT IS THEREFORE ORDERED That the Ada County Sheriff bring the Defendant from the Penitentiary to the Court at said time and on said date;

IT IS FURTHER ORDERED That immediately following said Court appearance the Sheriff return said Defendant to the custody of the Idaho State Penitentiary;

IT IS FURTHER ORDERED That the Idaho State Board of Correction release the said Defendant to the Ada County Sheriff for the purpose of the aforementioned appearance and retake him into custody from the Sheriff upon his return to the Penitentiary.

IT IS FURTHER ORDERED That the Clerk of this Court serve a copy hereof upon the Idaho Department of Corrections and the Ada County Sheriff forthwith and certify to the same.

Dated this 28th day of October, 2011.


MIKE WETHERELL
District Judge

CERTIFICATE OF MAILING

I hereby certify that on 10/28/2011, I Mailed (served) a true and correct copy of the within instrument to:

DEPARTMENT OF CORRECTION
Central Records
Faxed

ADA COUNTY JAIL
Transport
Faxed

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

<u>Time</u>	<u>Speaker</u>	<u>Note</u>
<u>10:07:37 AM</u>	M Wetherell	Ct calls case; FE0904448 Kerry Thomas present in custody w/counsel Rob Chastain/Jean Fisher
<u>10:08:17 AM</u>	Fisher	filed motion to correct sentence
<u>10:08:37 AM</u>	Chastain	argument re: Court of Appeals decision
<u>10:11:51 AM</u>	M Wetherell	Ct inquires of counsel -- w/response
<u>10:12:50 AM</u>	State	response
<u>10:16:23 AM</u>	Chastain	rebuttal -- Ct response/inquiries interspersed
<u>10:16:47 AM</u>	M Wetherell	Ct reads from June 24 -- hearing -- counsel reqt'd additional time to discuss w/client re: plea bargain -- following opportunity to meet Ct inquired of client w/def being present
<u>10:19:26 AM</u>	Def Counsel	cont'd discussion re: guilty plea
<u>10:28:57 AM</u>	State	response
<u>10:31:22 AM</u>	State	request reply brief to supplemental memorandum be corrected -- pgs 2, 4th line down--no objection
<u>10:32:20 AM</u>	M Wetherell	Ct amends by interlineation
<u>10:33:25 AM</u>	M Wetherell	History of criminal judicial system -- Ct rules def will not allow def to w/draw his guilty plea -- Ct rules sentence to run consecutively to one another but not to any sentence def now serving -- grants State's reqt and chngs language of judgment in accordance w/strong suggestion from Ct of Appeals -- two sentences to one another are not consecutive to parole violation
<u>10:59:08 AM</u>	M Wetherell	appeal rights

NOV 03 2011

CHRISTOPHER D. RICH, Clerk
By LUCILLE DANSENEAU
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
)
 KERRY STEPHEN THOMAS,)
 DOB: [REDACTED])
 SSN: [REDACTED])
)
 Defendant.)
)
 _____)

Case No. CR-FE-2009-0004448

AMENDED
JUDGMENT OF CONVICTION
AND COMMITMENT

The purpose of this amendment is to remove the requirement that these sentences be served consecutive to any other sentence defendant is serving.

WHEREAS, on this 16th day of September, 2009; this being the time fixed by the Court for pronouncing sentence upon the Defendant, the Court noted the presence of the Deputy Prosecuting Attorney, the Defendant, and Anthony Geddes, counsel for the Defendant, in court.

The Defendant was duly informed of the Indictment filed, and the Defendant having entered a guilty plea on June 24, 2009, to the crimes of COUNT II. TRANSFER OF BODY FLUID WHICH MAY CONTAIN THE HUMAN IMMUNODEFICIENCY VIRUS (HIV) committed on or during November 2008; and COUNT VII. TRANSFER OF BODY FLUID WHICH MAY CONTAIN THE HUMAN IMMUNODEFICIENCY VIRUS (HIV), committed on or about the 23rd day of December, 2008. Counts I, III, IV, V, VI and the Information/Indictment Part II was dismissed pursuant to plea negotiations.

The Defendant and Defendant's counsel were then asked if they had any legal cause or reason to offer why judgment and sentence should not be pronounced against the Defendant, and if the Defendant, or Defendant's counsel, wished to make a statement on behalf of the Defendant, or to present any information to the Court in mitigation of punishment; and the Court, having accepted such statements, and having found no legal cause or reason why judgment and sentence should not be pronounced against the Defendant at this time; does render its judgment of conviction as follows, to-wit:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant is guilty of the crimes of COUNT II. TRANSFER OF BODY FLUID WHICH MAY CONTAIN THE HUMAN IMMUNODEFICIENCY VIRUS (HIV); and COUNT VII. TRANSFER OF BODY FLUID WHICH MAY CONTAIN THE HUMAN IMMUNODEFICIENCY VIRUS (HIV), and that he be sentenced as follows:

COUNT II – Defendant is hereby sentenced to the custody of the State Board of Correction of the State of Idaho for the term of not to exceed fifteen (15) years: with the first ten (10) years of said term to be FIXED, and with the remaining five (5) years of said term to be INDETERMINATE, to run concurrently with any other sentence Defendant is serving. The Defendant shall receive credit for one hundred ninety (190) days served in pre-judgment incarceration toward the FIXED portion of the term as provided by Idaho Code 18-309.

COUNT VII – Defendant is hereby sentenced to the custody of the State Board of Correction of the State of Idaho for the term of not to exceed fifteen (15) years: with the first ten (10) years of said term to be FIXED, and with the remaining five (5) years of said term to be INDETERMINATE, to be served consecutively to the sentence imposed in Count II and

concurrently with the any other sentence the Defendant is serving. The Defendant shall receive credit for one hundred ninety (190) days served in pre-judgment incarceration toward the FIXED portion of the term as provided by Idaho Code 18-309.

The Court recommends that the Defendant participate in any/all sex offender treatment and such other programs as are deemed appropriate by prison personnel.

Pursuant to Idaho Code Section 19-5304 the Defendant shall pay restitution to the victim of the Defendant's crime in the amount of \$1,653.35, which shall bear interest at the statutory rate of 5.625% per annum until paid in full. Restitution payments shall be made through the Clerk of the District Court. All other fines, fees and costs are hereby waived due to the Defendant's incarceration and resulting indigency.

The Defendant was advised of his rights to an appeal and then remanded to the custody of the Sheriff of Ada County, to be delivered FORTHWITH by him into the custody of the Director of the State Board of Correction of the State of Idaho.

Dated this 2nd day of November, 2011, nunc pro tunc, effective September 16, 2009.


MIKE WETHERELL
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of Nov, 20 11, I mailed (served) a

true and correct copy of the within instrument to:

ADA COUNTY PROSECUTOR'S OFFICE
VIA E-MAIL

ADA COUNTY PUBLIC DEFENDER'S OFFICE
VIA E-MAIL

CENTRAL RECORDS
DEPARTMENT OF CORRECTION
VIA E-MAIL

Rob Chastain
via e-mail
11/14/11 *ld*

J. DAVID NAVARRO
Clerk of the District Court

By: *[Signature]*
Deputy Court Clerk

NOV 14 2011

CHRISTOPHER D. RICH, Clerk
By ELAINE TONG
DEPUTY

ROBERT R. CHASTAIN
ATTORNEY AT LAW
300 Main, Suite 158
Boise, ID 83702-7728
Telephone: (208) 345-3110
Idaho State Bar #2765

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KERRY S. THOMAS,)	
	)	Case No. CRFE 2009-4448
Defendant-Appellant,)	
vs.)	
	)	NOTICE OF APPEAL
STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	
_____)	

TO: THE ABOVE NAMED PLAINTIFF-RESPONDENT, GREG H. BOWER, ADA COUNTY PROSECUTOR, AND THE CLERK OF THE COURT.

NOTICE IS HEREBY GIVEN:

1. The above named Appellant appeals against the State of Idaho to the Idaho Supreme Court from the District Court's Order denying Mr. Thomas' Motion to Withdraw Guilty Plea, said Order entered by the Hon. Mike Wetherell, District Judge, on November 2, 2011.

2. Mr. Thomas has a right to appeal to the Idaho Supreme Court, and the District Court's Order denying Motion to Withdraw Guilty Plea, described in paragraph 1 above, is appealable under and pursuant to Idaho Appellate Rule (I.A.R.) 11(c)(1-10).

3. A preliminary statement of the issues on appeal, which the appellant then intends to assert in the appeal, provided any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal is:

- (a) Did the District Court err by refusing to grant Mr. Thomas' Motion to Withdraw his guilty plea?

4. The appellant requests the preparation of the entire reporter's standard transcript defined in I.A.R. 25(a). The appellant also requests the preparation of the following portions of the reporter's transcript:

- (a) A transcript of the hearing held on appellant's Motion to Withdraw Guilty Plea, and the District Court's oral ruling denying appellant's Motion to Withdraw Guilty Plea hearing held on November 2, 2011.
- (b) All records and documents associated with the Idaho Court of Appeals 2011 unpublished opinion on No. 377, Docket No. 36947.

5. The appellant requests the standard clerk's record pursuant to I.A.R. 28(b)(2). The appellant requests the following documents to be included in the clerk's record, in addition to those automatically included under I.A.R. 28(b)(2):

- (a) Any briefs, affidavits, or memorandums filed or lodged by the

state, appellant or the court in support of or in opposition to the Motion to Withdraw Guilty Plea.

6. I certify:

- (a) A copy of this *Notice of Appeal* has been served on the court reporter.
- (b) The appellant is exempt from paying the estimated transcript fee because he is an indigent person and is unable to pay said fee. (Idaho Code §§ 31-3220, 31-3220A, I.A.R. 24 (e));
- (c) The appellant is exempt from paying the estimated fee for preparation of the record because he is an indigent person and is unable to pay said fee. (Idaho Code §§ 31-3220, 31-3220A, I.A.R. 24(e)).
- (d) The appellant is exempt from paying the appellate filing fee because he is indigent and is unable to pay said fee. (Idaho Code §§ 31-3220, 31-3220A, I.A.R. 23(a)(8)).
- (e) Service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 14 day of November, 2011.



ROBERT R. CHASTAIN
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify on the 14 day of November, 2011, I served a true and correct copy of the within and foregoing document upon the individual(s) named below in the manner noted:

Jean M. Fisher,
Ada County Prosecutor

- By first class mail, postage prepaid
- By hand delivery
- By faxing the same to:

Office of the State Appellate Public Defender
3647 N. Lake Harbor Lane
Boise, ID 83703

- By first class mail, postage prepaid
- By hand delivery
- By faxing the same to:

Court Reporter

- By first class mail, postage prepaid
- By hand delivery to the Ada County Courthouse
- By faxing the same to:

Kerry Thomas,
ICC, Unit K
P. O. Box 70010
Boise, ID 83707

- By first class mail, postage prepaid
- By hand delivery
- By faxing the same to:



Robert R. Chastain

NOV 14 2011

CHRISTOPHER D. RICH, Clerk
By ELAINE TONG
DEPUTY

ROBERT R. CHASTAIN
ATTORNEY AT LAW
300 Main, Suite 158
Boise, ID 83702-7728
Telephone: (208) 345-3110
Idaho State Bar #2765

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KERRY S. THOMAS,)	
	)	Case No. CRFE 2009-4448
Defendant-Appellant,)	
)	
vs.	)	MOTION FOR ORDER
	)	APPOINTING STATE
STATE OF IDAHO,	)	APPELLATE PUBLIC
	)	DEFENDER ON APPEAL
Plaintiff-Respondent.)	

COMES NOW Robert R. Chastain, conflict Ada County Public Defender for the Defendant, and hereby moves this Court for its Order appointing the State Appellate Public Defender to represent Mr. Thomas in his appeal.

This Motion is made on the basis the Defendant-Appellant has no personal funds with which to hire private counsel and desires to have the services of the Idaho State Appellate Public Defender provided.

MOTION/ ORDER APPOINTING STATE
APPELLATE PUBLIC DEFENDER ON DIRECT APPEAL

DATED this 14 day of November, 2011.



ROBERT R. CHASTAIN
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify on the 14 day of November, 2011, I served a true and correct copy of the within and foregoing document upon the individual(s) named below in the manner noted:

Jean M. Fisher,
Ada County Prosecutor


- By first class mail, postage prepaid
- By hand delivery
- By faxing the same to:

State Appellate Public Defender
3647 N. Lake Harbor Lane
Boise, ID 83703

- By first class mail, postage prepaid
- By hand delivery
- By faxing the same to:

Kerry Thomas,
ICC, Unit K
P. O. Box 70010
Boise, ID 83707

- By first class mail, postage prepaid
- By hand delivery
- By faxing the same to:



ROBERT R. CHASTAIN

MOTION/ORDER APPOINTING STATE APPELLATE
PUBLIC DEFENDER ON DIRECT APPEAL

NO. _____
AM. _____ FILED PM. *1:25*

ROBERT R. CHASTAIN
ATTORNEY AT LAW
300 Main, Suite 158
Boise, ID 83702-7728
Telephone: (208) 345-3110
Idaho State Bar #2765

NOV 15 2011

CHRISTOPHER D. RICH, Clerk
By DIANE O'BRIEN
Deputy

Attorney for Defendant-Appellant

RECEIVED
NOV 14 2011
ADA COUNTY CLERK

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KERRY S. THOMAS,)
)
 Defendant-Appellant,)
)
 vs.)
)
 STATE OF IDAHO,)
)
 Plaintiff-Respondent,)

Case No. CRFE 2009-4448
ORDER APPOINTING STATE
APPELLATE PUBLIC
DEFENDANT ON APPEAL

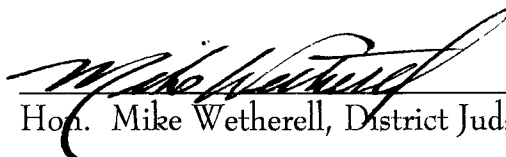
The above matter having come before this Court, and good cause appearing, the Court finds Kerry Thomas has elected to pursue a direct appeal in the above entitled matter and is without sufficient funds with which to hire private counsel for his appeal.

It is hereby deemed the Defendant is indigent and in need of an appointed attorney to pursue the appeal.

MOTION/ORDER APPOINTING STATE APPELLATE
PUBLIC DEFENDER ON DIRECT APPEAL

IT IS HEREBY ORDERED AND THIS DOES ORDER the Idaho State Appellate Public Defender is appointed to represent the above named Kerry Thomas in all matters pertaining to his direct appeal.

DATED this 15th day of November 2011.


Hon. Mike Wetherell, District Judge

CERTIFICATE OF SERVICE

I hereby certify on the 15 day of November 2011, I served a true and correct copy of the within and foregoing document upon the individual(s) named below by first class mail, postage prepaid:

Office of the State Appellate Public Defender
3647 N. Lake Harbor Lane
Boise, ID 83703

Jean M. Fisher
Ada County Prosecutor
Via Interdepartmental Mail

Robert R. Chastain
Attorney at Law
300 Main, Suite 158
Boise, ID 83702-7728

CHRISTOPHER D. RICH,
Clerk of the Court

BY: 

MOTION/ORDER APPOINTING STATE APPELLATE
PUBLIC DEFENDER ON DIRECT APPEAL

TO: CLERK OF THE COURT
IDAHO SUPREME COURT
451 WEST STATE STREET
BOISE, IDAHO 83702

NO. _____
A.M. 8:00 FILED P.M. _____

FEB 03 2012

CHRISTOPHER D. RICH, Clerk
By BRADLEY J. THIES
DEPUTY

STATE OF IDAHO,)
) Supreme Court No.
) 39374-2011
Plaintiff-Respondent,)
vs.) Case No. CRFE-09-4448
)
KERRY THOMAS,)
)
Defendant-Appellant.)
_____)

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on December 28, 2011, I lodged a transcript 40 pages of length for the above-referenced appeal with the District Court Clerk of the **County of Ada** in the Fourth Judicial District.

HEARING DATES INCLUDED:

November 2, 2011



Vanessa S. Gosney, Official Court Reporter



Date

BT

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff-Respondent,
vs.

KERRY STEPHEN THOMAS,

Defendant-Appellant.

Supreme Court Case No. 39374


CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 6th day of February, 2012.

CHRISTOPHER D. RICH
Clerk of the District Court

By 
Deputy Clerk

CERTIFICATE OF EXHIBITS

000107

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff-Respondent,
vs.

KERRY STEPHEN THOMAS,

Defendant-Appellant.

Supreme Court Case No. 39374

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

LIMITED CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

STATE APPELLATE PUBLIC DEFENDER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

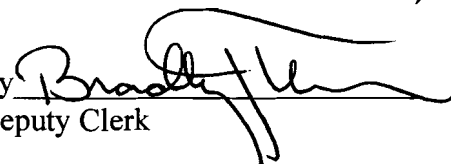
LAWRENCE G. WASDEN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

CHRISTOPHER D. RICH
Clerk of the District Court

Date of Service: FEB 06 2012

By 
Deputy Clerk

CERTIFICATE OF SERVICE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff-Respondent,
vs.

KERRY STEPHEN THOMAS,

Defendant-Appellant.

Supreme Court Case No. 39374

CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 14th day of November, 2011.

CHRISTOPHER D. RICH
Clerk of the District Court

By 
Deputy Clerk

CERTIFICATE TO RECORD

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